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Ben Dunlap Jr.

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by
BEN DUNLAP JR.*

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* Associate at Nauman, Smith, Shissler & Hall, Harrisburg, Pa.; B.S. in Journalism, West Virginia University, Morgantown, 1980; J.D., The Dickinson School of Law, Carlisle, Pa., 1992. Nauman, Smith, Shissler & Hall represents several central Pennsylvania newspapers. Prior to law school, the author was a reporter for Lancaster (Pa.) Newspapers and publicity manager for PREVENTION and MEN'S HEALTH magazines. He would like to thank Professor Thomas M. Place of The Dickinson School of Law for his advice and supervision; John C. Sullivan, Esquire, of Nauman, Smith, Shissler & Hall for his support of this effort; and most of all his father, Ben Dunlap Sr., without whose patronage the author might never have gone to law school.

Introduction

Among the many voices calling for libel law reform in recent years,[1] perhaps the most powerful belongs to the Uniform Law Commissioners.[2] Following more than three years of debate and revisions, a specially appointed drafting committee has settled on "the basic structure" of a comprehensive proposal for reform[3] called the Uniform Defamation Act.[4] Following public hearings on the Act in October 1992, the drafting committee will prepare a final draft for adoption by the full conference of commissioners at their annual meeting in the summer of 1993.[5]

While primarily drawing on the common law and incorporating current constitutional protections, the Uniform Defamation Act ("the Act") would revolutionize libel law through the institution of a declaratory judgment action to restore reputation. The idea of such a "no-damages" remedy is not new,[6] but with the commissioners' machinery for instituting changes in state laws,[7] the Act, if it can overcome opposition of the

1. *See, e.g.*, RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS (1987); LOIS G. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT (1987); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991); Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989); C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REF. 1 (1989); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in its Proper Place*, 101 HARV. L. REV. 1287 (1988); Joan E. Schaffner, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433 (1990).

2. Formally known as the National Conference of Commissioners on Uniform State Laws.

3. Telephone Interview with Randall P. Bezanson, Reporter for the Uniform Defamation Act Drafting Committee and Dean of Washington and Lee University School of Law (Apr. 2, 1992).

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIF. DEFAMATION ACT (Tent. Draft Feb. 6, 1992).

5. Bezanson Interview, *supra* note 3.

6. Professor Marc A. Franklin is widely credited as one of the first to propose such reform. For his earliest writing on the subject see *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983).

7. Each state is represented in the full conference, and individual commissioners may introduce any act adopted by the full conference in his or her respective state legislature and work for its passage there. In addition, the national organization provides experts to testify in state legislatures to support such efforts. Telephone Interview with Renee Skower, Administrative Assistant for the National Conference of Commissioners on Uniform State Laws (May 5, 1992).

press,[8] has a more realistic chance for enactment than earlier legislative proposals.[9]

The idea of a declaratory judgment action to restore reputation has its roots in the criticism that current libel law serves the interests of no one.[10] Because of the limitations on libel actions imposed by *New York Times v. Sullivan*[11] and following cases, few plaintiffs ever receive the opportunity to restore their reputations through the legal system because defendants prevail on seventy-five percent of their motions for summary judgment.[12] Therefore, the issue of falsity is never reached in most cases.

However, when libel cases do go to trial, the media tend to lose, and lose big. Media libel defendants lose sixty-six percent of the time in jury trials.[13] By way of contrast, plaintiffs prevail in about half of all other tort cases tried before a jury.[14] In product liability and medical malpractice cases, plaintiffs prevail thirty to forty percent of the time.[15] As will be discussed in Section I of this article, the *average* initial jury award against a media defendant is now in the millions.

Central to the Uniform Defamation Act's attempt to remedy some of these problems is the premise that many libel plaintiffs "would be satisfied with vindication, that is with a determination that the statement was false."[16] Indeed, Randall P. Bezanson, Reporter for the Uniform Defamation Act Drafting Committee, was a co-author of the landmark Iowa Libel Research Project ("Iowa Project"), which studied cases over a ten-year period to determine why libel plaintiffs sue and how non-litiga-

8. While the press is not happy with the current state of libel law either, at least its risks are known. *See* Anderson, *supra* note 1, at 546-50.

9. The most widely discussed of the earlier legislative proposals are ANNENBERG WASHINGTON PROGRAM IN COMMUNICATIONS POLICY STUDIES OF NORTHWESTERN UNIVERSITY, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1988), *reprinted in* RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.13 [4][a]-[c] (1992) [hereinafter ANNENBERG LIBEL REFORM ACT], and H.R. 2846, 99th Cong., 1st Sess. (1985) (introduced by Representative Charles Schumer). Neither these nor any other reform proposal of the past decade has been adopted in any jurisdiction. *See* Anderson, *supra* note 1, at 490-91.

10. *See generally* Anderson, *supra* note 1, at 488-93, 510-36.

11. 376 U.S. 254 (1964).

12. *LDRC Study #8—Summary Judgment Motions in Libel Actions: Two Year Update (1984-86)*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), 1987, at 2.

13. LDRC RECAP AND UPDATE: *Trial Results, Damage Awards and Appeals, 1980-89 and 1990-91: The "Chilling Effect" Writ Large... Then Writ Larger*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), July 31, 1992, at 3, 6 (figure includes directed verdicts) [hereinafter LDRC RECAP AND UPDATE]. Ninety-two percent of all libel cases in the 1980s were tried before juries. *Id.*

14. *Juries and Damages: Comparing the Media's Libel Experience to Other Civil Litigants*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), Jan. 31, 1984, at 24.

15. *Id.* at 25.

16. UNIF. DEFAMATION ACT, *supra* note 4, at 2 (prefatory note).

tion alternatives might be used to resolve these disputes.[17] In retrospective interviews by Iowa Project researchers, less than a quarter of surveyed libel plaintiffs said that monetary damages was the major factor in their initial decision to sue.[18] Instead, the desire to restore a damaged reputation ranked foremost.[19]

The media in general has been more responsive to the handling and correction of mistakes in recent years.[20] The Act, however, would provide further incentives to retract incorrect statements as well as penalties for the failure to do so.

The tradeoff for the Act's action for vindication, in which defendants are precluded from asserting their constitutional fault-based privileges, is a limitation on damages. Plaintiffs can collect only their costs of litigation in a vindication action.[21] In an action for damages, the Act eliminates general and presumed damages and limits the recovery of plaintiffs who refuse to accept a termination offer to pecuniary damages.[22]

Critics assert that the Act gives the press too little in return for the uncertainties of an unproven system. Further, they question how much the Act will actually limit damages, especially since the current version contains an alternative provision allowing punitive damages.[23]

I
The Economics of Libel

The Libel Defense Resource Center ("LDRC") recently released the results of a ten-year study of libel verdicts against the media. The study showed that in the period from 1980-89, the average jury libel award against media defendants was $1.47 million.[24] Nearly a quarter of all libel awards by juries during the period were for more than $1 million, with two percent of the awards coming in at more than $10 million.[25]

17. *See* BEZANSON, *supra* note 1.

18. *Id.* at 79.

19. *Id.* Interestingly, the second-ranked reason for bringing suit was a desire to punish the press.

20. Since the Iowa Project study was released, Dean Bezanson has worked with a number of news organizations to help them improve the manner in which they handle defamation complaints. The Knight-Ridder newspaper chain in particular has expressed to him a marked improvement in its ability to resolve complaints at the newspaper level, before attorneys become involved in the dispute. Bezanson Interview, *supra* note 3.

21. UNIF. DEFAMATION ACT, *supra* note 4, § 5 cmt. and § 8(a)(1).

22. *Id.* § 9(b) and cmt., § 12(b).

23. *Id.* § 10 and cmt.

24. LDRC RECAP AND UPDATE, *supra* note 13, at 3, 8.

25. *Id.*

The amount awarded in libel actions is increasing. The average jury award skyrocketed to more than $9 million in 1990-91.[26] Indicative that the higher average award in the 1990-91 period might not be a fluke is that six of the ten largest defamation awards ever rendered against media defendants have been handed down since the spring of 1990.[27]

Libel law is also complex. In a recent case in which the jury awarded a $2.05 million verdict against *The Washington Post*,[28] post-trial discussions with jurors showed they ignored the judge's detailed instructions that actual malice must be proven, that the plaintiff had the burden of proving falsity, and that the challenged statements were to be considered in the context of the article as a whole.[29] The judge's instructions totalled thirty-seven pages in the trial transcript, and took two hours to read. "We never understood the instructions and never pretended to," said one juror.[30]

Jurors are many times denied use of a written version of a judge's instructions for guidance during their deliberations, further compounding confusion.[31] Jury misunderstandings and misapplications of the complex rules in libel law then need to be dealt with on appeal, which increases defense costs.[32]

26. *Id.* at 4, 8. The median jury award against media libel defendants similarly increased to $1.5 million in 1990-91, from $200,000 in the earlier 10-year period.

27. Feazell v. Belo Broadcasting, No. 86-2227-1 (Tex. Dist. Ct. McClennan County, Apr. 19, 1991) ($58 million awarded: $17 million compensatory, $41 million punitive); Sprague v. Walter, No. 3644, 1973 Term (Pa. Ct. C.P. Phila. County, May 3, 1990) ($34 million awarded: $2.5 million compensatory, $31.5 million punitive); Srivastava v. Harte Hanks, No. 85 CI 15150 (Tex. Dist. Ct. Bexar County, Apr. 10, 1990) ($29 million awarded, not including interest: $11.5 million compensatory, $17.5 million punitive); Prozeralik v. Capital Cities, Inc., No. 860411 (N.Y. Sup. Ct. Erie County, July 10, 1991) ($18.47 million awarded: $8.47 million compensatory, $10 million punitive); Newcomb v. Plain Dealer, No. 93757 (Ohio Ct. C.P. Cuyahoga County, Sept. 14, 1990) ($13.5 million awarded: $4.5 million compensatory, $9 million punitive). *As reported in Follow-Up Report of the Libel Defense Resource Center on the [Uniform] Defamation Act*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), Aug. 1, 1991, at 13 [hereinafter *Follow-Up Report*]. Nguyen v. Nguyen (Cal. Super. Ct. Orange County, Sept. 6, 1991) ($16 million awarded: $580,000 special, $3.5 million general, $12 million punitive). *The [Uniform] Defamation Act: An LDRC Special Report*, LDRC BULLETIN (Libel Defense Resource Center, New York, N.Y.), June 30, 1992, at 14.

28. Tavoulareas v. Washington Post Co., No. 80-3032 (D.D.C. July 30, 1982), *judgment n.o.v.*, 567 F. Supp. 651 (D.D.C. 1983), *aff'd in part and rev'd in part*, 759 F.2d 90 (D.C. Cir. 1985), *vacated in part*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc), *on rehearing*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), *and cert. denied*, 484 U.S. 870 (1987).

29. Steven Brill, *Inside the Jury Room at the Washington Post Libel Trial*, TRIAL BY JURY 13, 29-32 (1989).

30. *Id.* at 29.

31. BRUCE W. SANFORD, LIBEL AND PRIVACY § 14.10 (2d ed. 1991).

32. To counter misunderstanding and misapplication of the law, more courts are requiring the use of special interrogatories in libel litigation. *Id.*

Only about one-quarter of all awards against media defendants survive the post-trial and appellate process as initially entered, however.[33] Most of these awards are either reversed or substantially reduced.[34] The average of all finally affirmed awards during the 1980s was $259,249.[35] At the same time, multi-million dollar awards were affirmed against media defendants for the first time.[36]

Nor are libel suits cheap to defend. Bruce Sanford, a First Amendment attorney at Baker & Hostetler in Washington, D.C., and author of the treatise *Libel and Privacy*, estimated that even a simple libel action can cost $20,000 to defend *before* the case reaches trial.[37] A "tenacious plaintiff or an unsympathetic judge" can increase pretrial costs to $500,000.[38]

Much of the pretrial costs in a public figure libel case are consumed in discovery to determine whether the media acted with knowledge of a story's falsity or in reckless disregard for the truth.[39] In the protracted *Herbert v. Lando*[40] litigation, in which CBS reportedly spent $3 to $4 million on defense costs, the deposition of CBS producer Barry Lando continued off and on for a year and filled over 3,000 pages of transcript.[41]

Costs for a suit that reaches trial can go through the roof. CBS reportedly spent between $5 and $10 million to defend *Westmoreland v. CBS*[42] before the case was settled.[43] Professor Smolla has described the situation as follows:

> What is clear from this financial portrait is that if the plaintiff's primary motive is vindication through punishment of the media defendant, it is not necessary to win in order to win. If the suit can be prolonged sufficiently[,] the mere ticking away of the defense lawyer's clock will be enough to extract the pound of flesh.[44]

33. LDRC RECAP AND UPDATE, *supra* note 13, at 4.

34. *Id.*

35. *Id.*

36. Brown & Williamson v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) ($3.05 million award against CBS); DiSalle v. PG Publishing Co., 544 A.2d 1345 (Pa. Super. Ct. 1988), *allocatur denied*, 557 A.2d 724 (Pa. 1989), *and cert. denied*, 492 U.S. 906 (1989) ($2.21 million award against the *Pittsburgh Post-Gazette*).

37. Alex Jones, *Libel Threat is Increasing Even for Small Publications*, N.Y. TIMES, Feb. 3, 1992, at D8.

38. *Id.*

39. *See* RODNEY A. SMOLLA, SUING THE PRESS: LIBEL, THE MEDIA & POWER 67 (1986). *See also* Anderson, *supra* note 1, at 516-21.

40. 441 U.S. 153 (1979).

41. SMOLLA, *supra* note 39, at 71, 75.

42. 596 F. Supp. 1170 (S.D.N.Y. 1984).

43. SMOLLA, *supra* note 39, at 75.

44. *Id.* at 76.

The economic costs to mount a libel suit can be just as grim for plaintiffs.[45] Because of the difficulty of overcoming the defendant's fault privileges and the substantial risk of having any jury award reversed or reduced, the libel system is "effectively foreclosed" to any plaintiff who is not wealthy or powerful.[46] Although eighty percent of libel suits are brought on a contingency basis,[47] these suits "tend to wither away once the obstacles [of libel litigation] become clear,"[48] unless "the value of the case lies in its visibility and the potential to represent the plaintiff again."[49]

The present libel system is therefore one in which three-quarters of all plaintiffs lose on summary judgment, media defendants lose two out of three jury trials, generally suffering large damage awards, and three-quarters of all awards are either reversed or reduced post trial or on appeal. In such a system, it is small wonder that an estimated eighty percent of media defendants' libel costs are spent on attorney fees, with the remaining twenty percent covering all affirmed jury awards and settlements.[50]

Many media companies carry libel insurance to help pay these costs.[51] However, "the insurance company is simply a clearinghouse. It pays the bill today and increases the rates tomorrow," said Walter Coady, whose company supplies libel insurance to the Public Broadcasting System, National Public Radio and about 1,300 generally small newspapers across the country.[52] According to Mr. Coady, premiums jumped almost one hundred percent in 1985 and another one hundred percent in 1986, following *Westmoreland v. CBS*[53] and *Sharon v. Time, Inc.*,[54] which cost the industry $15 million in legal fees.[55] Since then, however, rates have stabilized.[56]

45. William Tavoulareas estimated the legal bill in his suit against *The Washington Post* at about $1.8 million. Brill, *supra* note 29, at 34.

46. Randall P. Bezanson & Brian C. Murchison, *The Three Voices of Libel*, 47 WASH. & LEE L. REV. 213, 222 (1990).

47. BEZANSON, *supra* note 1, at 148.

48. Bezanson & Murchison, *supra* note 46.

49. BEZANSON, *supra* note 1, at 148.

50. SMOLLA, *supra* note 39, at 75.

51. However, some media companies, such as *The New York Times*, do not. *Id.* at 77.

52. Telephone Interview with Walter Coady, President, Walterry Insurance Brokers, Washington, D.C. (Apr. 20, 1992).

53. 596 F. Supp. 1170 (S.D.N.Y. 1984).

54. 599 F. Supp. 538 (S.D.N.Y. 1984).

55. Coady Interview, *supra* note 52 (Mar. 2, 1992).

56. *Id.*

II
Analysis of the Uniform Defamation Act

This article does not claim to distinguish all ways in which the Uniform Defamation Act would alter present libel law.[57] Instead, the author's intention is to highlight the Act's central features, comparing its substantive proposals with present law and analyzing the Act's potential effect.

A. Vindication Actions—Changing the Emphasis From Fault to Falsity

The heart of the Uniform Defamation Act is its establishment of a declaratory judgment cause of action as an alternative to the traditional suit for damages. The plaintiff in the Act's action for vindication forgoes the opportunity for monetary damages and instead seeks to clear her name through "a written and published finding of fact on the question of falsity."[58]

In order that an action for vindication might fulfill its purpose of determining the truth or falsity of a statement and because no monetary damages are at stake, defendants are precluded from asserting constitutional privileges based on actual malice or negligence, as well as conditional privileges based on common law.[59] Only a defendant's successful raising of one of the Act's absolute privileges will bar an action for vindication.[60]

A revised provision in the most recent versions of the Act offers defendants a cost-free alternative to defending every vindication action brought against them. If at any time within ninety days of service of process, the defendant disclaims any assertion of truth in the statement and agrees to publish a retraction to that effect, the court is required to dismiss a pending vindication action following actual publication of the

57. Indeed, the Act seeks to simplify the law by making all defamations subject to the same rules. Consequently, the Act removes all distinctions between libel and slander as well as the rules of liability turning on the distinction. The Act also draws no distinctions based on the media or non-media identity of a defendant. *See* UNIF. DEFAMATION ACT, *supra* note 4, § 2 cmt. Furthermore, the Act eliminates strict liability in the few instances still permitted by U.S. Supreme Court decisions—*i.e.*, instances of purely private libel—and states that "the remaining instances of strict liability . . . are so narrow as to be of doubtful utility as a matter of policy." *Id.* § 9 cmt. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

58. UNIF. DEFAMATION ACT, *supra* note 4, § 5 cmt.

59. *Id.*

60. *Id. See* discussion of absolute privileges in section D.1., *infra*.

retraction.[61] No attorney fees or litigation costs are awarded to a plaintiff in this scenario.[62]

If, however, a defendant loses a vindication action that it chooses to defend and has "unreasonably" refused to publish a timely retraction, the plaintiff shall be awarded attorney fees and other litigation costs.[63] A prevailing defendant, on the other hand, shall be awarded its attorney fees and litigation costs only "upon proof that the plaintiff had no reasonable basis upon which to allege falsity."[64]

Because defendants can be involuntarily subjected to actions for vindication and the payment of litigation costs, such a provision necessarily raises constitutional questions. There is no clear answer regarding the constitutionality of such a proposal, because *New York Times v. Sullivan*[65] and its progeny speak only to the issue of constitutional restraints on damage awards.[66] Justice White did give a general endorsement to declaratory judgment actions in his concurrence to *Dun & Bradstreet v. Greenmoss Builders*, declaring that he can "discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false."[67]

Furthermore, the losing defendant in an action for vindication can choose to publish the court's findings of fact itself or pay the plaintiff a sufficient amount to reach substantially the same audience by publishing the findings elsewhere.[68] This would seem to circumvent the First Amendment prohibition on government intrusion into the editorial process by compelling editors "to publish that which 'reason tells them should not be published.' "[69]

61. *Id.* § 6.

62. *Id.* This provision first appeared in the Dec. 6, 1991, draft in the Comments to Section 6. UNIF. DEFAMATION ACT § 6 cmt. (Tent. Draft, Dec. 6, 1991). It was included as an explicit provision of the Act in the Feb. 6, 1992, draft. UNIF. DEFAMATION ACT § 6.

63. UNIF. DEFAMATION ACT, *supra* note 4, § 8(a)(1). In order to recover litigation expenses under the most recent working version of the Act, a prevailing plaintiff must prove "that the defendant had no reasonable basis to refuse a timely correction or clarification." UNIF. DEFAMATION ACT § 3-104(a)(1) (Tent. Draft, Oct. 21, 1992 (1/05/93 Revision)).

64. *Id.* § 8(a)(2). The Comment to Section 8 explains that this provision was included as a tradeoff to defendants for their only being permitted to claim absolute privileges as a bar to vindication actions and to deter plaintiffs from bringing frivolous vindication actions. *Id.* § 8 cmt.

65. 376 U.S. 254 (1964).

66. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 279-83 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50 (1974); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 755-61 (1985).

67. 472 U.S. at 768 n.2 (White, J., concurring in judgment).

68. UNIF. DEFAMATION ACT, *supra* note 4, §§ 7(a), 15(b)(1).

69. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945)).

Nevertheless, a media defendant who wishes to stand behind the truth of its story could be subjected to substantial costs in an action for vindication. That is because the "reasonable expenses of litigation" that the prevailing plaintiff can recover are "intended to be inclusive of all costs of litigation."[70] This broad standard includes not only the recovery of attorney fees and costs, but also the expenses associated with witnesses, experts, travel, and so forth.[71]

Critics contend that such costs would be akin to damages, especially under their assertion that the costs of vindication actions would not be insubstantial. Sandy Baron, former Senior Managing Attorney for NBC, terms it "a fallacy" that trials to determine truth or falsity will necessarily be less expensive than the current fault-based system.[72] Baron cited, as examples of obstacles in the path of determining truth, the problems posed by confidential sources and documents upon which the reporter relied, but to which the parties do not have access.[73]

In addition, most libel litigation does not concern clear, objective factual inaccuracies, according to Henry Kaufman, General Counsel for the Libel Defense Resource Center.[74] Those sorts of statements are usually voluntarily resolved. Problems generally concern "all of the other dicey, opinionated conclusions or implications of the facts" published or broadcast by the media.[75]

"The cases that get litigated are when the plaintiff says, 'You really said more about me than you will admit to, and I want to use this as an occasion to eliminate all of the questions and implications that arise out of [those] true facts,' " Mr. Kaufman explained. Litigation then results from the impasse over the press's "good faith inability to correct or retract what the plaintiff overambitiously wants to correct or retract."[76]

Even Dean Bezanson concedes the assertion that an award of litigation expenses would be akin to damages is "certainly . . . not . . . beyond reasonable grounds for argument."[77] He does not believe such an argument would prevail, he said, because the Supreme Court has always been

70. UNIF. DEFAMATION ACT, *supra* note 4, § 8(a)(1) and cmt.

71. *Id.*

72. Telephone Interview with Sandy Baron, former Senior Managing Attorney for NBC (Mar. 26, 1992). Ms. Baron was also a member of the Annenberg Libel Reform Project.

73. *Id.* In order for a retraction to be considered sufficient under § 15(b)(2)(iii) of the Act, it must identify the source of any statement attributed to another person, even if the original publication did not do so. UNIF. DEFAMATION ACT, *supra* note 4, § 15 cmt.; *see also infra* text accompanying notes 142-49.

74. Telephone Interview with Henry Kaufman, General Counsel for the Libel Defense Resource Center (Mar. 5, 1992).

75. *Id.*

76. *Id.*

77. Bezanson Interview, *supra* note 3.

careful to draw a distinction between the award of monetary damages and other remedies in fashioning the fault-based privileges. The award of litigation costs to a winning party has never been considered a constitutional problem, he added.[78]

Professor Rodney Smolla was director of the Annenberg Libel Reform Project, which released its reform proposal in October 1988.[79] In that proposal, either party could force the other into a declaratory judgment action.[80]

"I've gone 'round and 'round on this, but my view now is that this ought not be done," Professor Smolla said. "I would prefer to see that section of the Act be something that can only be triggered if both parties agree to it."[81]

Professor Smolla surmised that a forced vindication action might pass muster if the Act overall were as speech protective as the current constitutional minimums. However, "It's hard for me to read the Act as drafted and say that this is as good a deal for the media as *New York Times v. Sullivan*," he said.[82]

Another potential problem, some critics contend, is that a vindication system could increase the number of libel suits brought against the media.[83] Indeed, the very purpose of a declaratory judgment system is to open up the legal system to plaintiffs who would be foreclosed from obtaining relief under the current fault-based system.[84] On this point of increased litigation, one generally pro-reform commentator writes:

> A declaratory judgment remedy . . . might enmesh the media, or particular media outlets, in many minor-league lawsuits over inaccuracies that today go unchallenged. There are media antagonists, both national and local, who would happily avail themselves of new opportunities to bedevil the media they dislike.[85]

78. *Id.*

79. ANNENBERG LIBEL REFORM ACT, *supra* note 9.

80. *See id.* § 4(a), (e).

81. Telephone Interview with Rodney A. Smolla, Professor and Director of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law (Mar. 31, 1992). Professor Smolla is also the American Bar Association's Advisor to the Uniform Defamation Act Drafting Committee.

82. *Id.*

83. Kaufman Interview, *supra* note 74; Telephone Interview with René Milam, Manager of Legal Affairs for the Newspaper Association of America (Mar. 2, 1992).

84. *See* Bezanson & Murchison, *supra* note 46, at 215-16, 224.

85. Anderson, *supra* note 1, at 546. Such lawsuits might also be used to stifle debate, according to one participant at the drafting committee's October 1992 public hearing. As editor of the small *Journal of Medical Primatology*, J. Moor-Jankowski, M.D., published a letter criticizing a multinational pharmaceutical company's use of wild chimpanzees for infectious medical studies in Africa. The result was a seven-year lawsuit, costing him over $1 million to win, over the truth or falsity of the letter. Dr. Moor-Jankowski questioned what would have happened if cigarette and asbestos companies had used libel laws to stifle debate

Whether the declaratory judgment scheme envisioned by the drafting committee could withstand constitutional scrutiny is, therefore, an open question. Indeed, it could be argued that a system that forces vindication actions upon defendants violates the intent of *New York Times v. Sullivan*[86] to provide sufficient breathing room for a free press. That is because would-be critics "may be deterred from voicing their criticism [on matters of public concern], even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to so do."[87]

"You can't verify the truth of each statement contained in a story to the nth degree and still meet your deadline, especially when you're dealing with public figures," said René P. Milam, Manager of Legal Affairs for the Newspaper Association of America.[88] "The effect of that could be to just nix the entire story and chill the news gathering process."[89]

B. Action for Damages—Limiting Recoveries

The tradeoff for the action for vindication is a limitation on damage awards. The Act forecloses general or presumed damages as well as recovery for "pure" emotional distress.[90] It does this by explicitly limiting recovery to "damages for harm to reputation and resulting emotional distress; and pecuniary damages caused by the publication."[91] In requiring that damages for emotional distress result from harm to reputation, the drafters' intent is "to limit the scope of emotional distress damages recoverable."[92] The Act defines pecuniary damages as "provable economic loss" or "out-of-pocket losses."[93]

The Act permits a defendant to limit damages by making a termination offer in which he agrees to publish a retraction and pay the plaintiff's attorney fees and other litigation expenses. A plaintiff who does not accept the offer is limited to pecuniary damages and may not recover attor-

over the first tentative findings on their products. J. Moor-Jankowski, M.D., Research Professor of Forensic Medicine and Director of the Laboratory for Experimental Medicine and Surgery in Primates at New York University Medical Center, Testimony before the Uniform Defamation Act Drafting Committee, Washington, D.C. (Oct. 9, 1992). *See also* Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

86. 376 U.S. 254 (1964).

87. *Id.* at 279.

88. Milam Interview, *supra* note 83.

89. *Id.*

90. UNIF. DEFAMATION ACT, *supra* note 4, § 9 cmt.

91. *Id.* § 9(b)(1), (2).

92. *Id.* § 9 cmt.

93. *Id.* §§ 1(2), 9 cmt.

ney fees and other litigation expenses.[94] This provision is analogous to the damage limitation provisions of retraction statutes in many states.[95]

In an action for damages, attorney fees and other litigation expenses "may be awarded to a prevailing plaintiff who made an adequate request for retraction within sixty days of publication," and who proves that the challenged statement was published with actual malice.[96] However, there is no provision made to award attorney fees to defendants in a damages action.

Much of this makes sense in the abstract. However, the practical question remains to what extent it would actually limit damages.

A recent case, *Weller v. American Broadcasting Companies*,[97] illustrates the difficulties in limiting jury awards even when general or presumed damages are eliminated and "proof of reputational harm" is required before a recovery for emotional distress may be obtained. The case concerned a silver dealer who was allegedly libeled by a series of broadcasts investigating whether an antique candelabra he had sold to a museum was stolen and overpriced. At least $1.8 million of the $2.3 million jury award would appear to be recoverable under the Act as proven injury to reputation or emotional distress; the presumed injury to personal reputation would be excluded under the Act.[98]

Weller offered no hard data to quantify his losses, and indeed proved no special damages.[99] In upholding the $800,000 portion of the award attributable to "proven injury" to the reputation of Weller and his business, the California Court of Appeal noted that Weller "did not offer the direct testimony of any customer or potential customer who refused to do business with him or [his company]," but instead provided "through his own testimony, evidence of statements made by potential customers that tended to prove injury to his reputation."[100] The $1 million claim

94. *Id.* § 12.

95. *See generally* SMOLLA, *supra* note 9, § 9.12[2][b].

96. UNIF. DEFAMATION ACT, *supra* note 4, § 11. This provision is removed from the most recent working version of the Act. *See* UNIFORM DEFAMATION ACT, Article II (Tent. Draft, Oct. 21, 1992 (1/05/93 Revision)).

97. 283 Cal. Rptr. 644 (Ct. App. 1991). The analysis of this case is borrowed from *Follow-Up Report*, *supra* note 27, at 13-15.

98. The jury award had the following components:

$1 million "for mental suffering";

$500,000 "for proven injury to [personal] reputation";

$300,000 "for proven injury to [corporate] reputation"; and

$500,000 "for presumed injury to [personal] reputation."

283 Cal. Rptr. at 648-49.

99. *Id.* at 659. The plaintiff alleged no personal pecuniary losses.

100. *Id.* at 658.

for emotional distress was supported only by Weller's own testimony as to his anger, depression, embarrassment, and humiliation.[101]

The problem in such cases has been characterized by Professor Smolla:

> [U]nlike other forms of personal injury litigation, in which the award of damages is tied at least to some degree to quantifiably measurable forms of loss—medical bills, lost wages, or diminished future earning power—the lawsuit for libel . . . is one of the most unusual creatures known to the legal world. The wrong inflicted on the victim is a subjective loss of reputation . . . triggered solely by the spoken or written word; on the mere basis of what has been said about a victim, a jury is instructed to employ a sort of alchemy to transform the intangible "damage to reputation" . . . into cold dollars and cents.[102]

The Libel Defense Resource Center has suggested that even with the Act's proposed damage limitations, it would not prevent "the imposition of 'compensatory' awards punitive in size if not intent."[103] During the 1980s, the compensatory component of libel awards by juries averaged $554,796.[104] Furthermore, the compensatory portions of six "mega-awards" handed down against media defendants in the past three years ranged from $2.5 million to $17 million and averaged over $8 million.[105]

The problem of excessive awards would not be remedied under the Act because plaintiffs would only need to prove damages "with reasonable certainty."[106] The LDRC goes on to say:

> At a minimum, given the largely indeterminate nature of "harm to reputation" and attendant "emotional distress," compensatory damages must be based on "clear and convincing" evidence of *actual* injury. Such a higher standard of proof, while no guarantee of the elimination of all excessive awards, at least would have the salutary effect of . . . requiring defamation plaintiffs to adduce and particularize some concrete evidence of their damages, rather than relying on generalized appeals to the sympathy—if not to the passion and prejudice—of the jury.[107]

Dean Bezanson countered that reasonable certainty is the "uniform" standard for proof of damages in U.S. tort law.[108] The U.S. Supreme Court has instructed that awards for actual injury in libel cases

101. *Id.*

102. SMOLLA, *supra* note 39, at 73.

103. *Follow-Up Report*, *supra* note 27, at 13.

104. *LDRC Recap and Update*, *supra* note 13, appendix A (based on average of 139 listed jury trials in which compensatory damages were separated out).

105. See *supra* note 27 for a list of the cases and the award amounts.

106. *Follow-Up Report*, *supra* note 27, at 16; UNIF. DEFAMATION ACT, *supra* note 4, § 3(3).

107. *Follow-Up Report*, *supra* note 27, at 16.

108. Bezanson Interview, *supra* note 3.

must be supported by "competent evidence . . . although there need be no evidence which assigns an actual dollar value to the injury."[109]

A larger problem, at least in terms of garnering media support for the Uniform Defamation Act, is that the Act does not contain an outright ban on punitive damages.[110] After wavering on the issue, the drafting committee settled on a bar on punitive damages in its August 1991 draft. At its annual meeting, however, the conference as a whole declined to follow that recommendation and instructed the drafting committee to include a provision allowing punitive damages "so they could revisit the issue at [the Act's] final reading."[111]

There was "a fair division of opinion in the Conference about the wisdom of eliminating punitive damages, at least in some cases," explained Dean Bezanson.[112] He described the alternative, permitting punitive damages, as "exceedingly narrow." In it, a plaintiff must prove both knowledge of falsity and ill will by clear and convincing evidence.[113] "Having to prove both of those things by clear and convincing evidence is a hurdle that I think a very few cases can overcome," he said.[114]

Furthermore, the "reckless disregard" standard, which represents a kind of "substituted judgment for the reasonableness of the journalist's behavior," is removed from the alternative provision permitting punitive damages, Dean Bezanson explained.[115] "So punitive damages will not be subject to award in cases in which the jury, in effect, conclude[s] there was gross negligence."[116]

Others are not convinced. Bob Hawley, an advisor to the Uniform Defamation Act Drafting Committee from the Media Conference Group of the ABA, said he is "deeply troubled" by the possible inclusion of

109. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

110. The Act currently contains two alternative provisions, one allowing punitive damages, the other prohibiting them. UNIF. DEFAMATION ACT, *supra* note 4, § 10. The issue is important to the media because 57% of all jury awards against media defendants from 1980-89 included punitive damages, with the average punitive award at more than $1.5 million. LDRC RECAP AND UPDATE, *supra* note 13, at 3, 9. The average punitive damage award by juries rose to $8.2 million in the 1990-91 period, however, *Id.* at 5, 9.

111. Telephone Interview with Bob Hawley, Associate General Counsel for The Hearst Corporation and Advisor to the Uniform Defamation Act Drafting Committee from the Media Conference Group of the American Bar Association (Apr. 1, 1992). *See also* UNIF. DEFAMATION ACT, *supra* note 4, § 10 cmt.

112. Bezanson Interview, *supra* note 3.

113. UNIF. DEFAMATION ACT, *supra* note 4, § 10 [Alternative B]. The comment to § 10 describes ill will as an "intent to harm." *Id.* § 10 cmt. Dean Bezanson further explains this as meaning that "the reason for publication was specifically to spite the plaintiff because of some personal animus." Bezanson Interview, *supra* note 3.

114. Bezanson Interview, *supra* note 3.

115. *Id.*

116. *Id.*

punitive damages in the Act. The proposal is especially troubling when many compensatory awards already include "some measure of punishment for speech," he said.[117] Even Dean Perlman, Chair of the Uniform Defamation Act Drafting Committee, in arguing before the full Conference of Commissioners for the elimination of punitive damages from the Act, said, "I think one need not fear that egregious behavior of a defamatory nature in the absence of punitive damages will go unpunished. Because this is a peculiar area in which the nature of compensatory damages is so vaporous and unstructured, juries in particularly egregious cases have a significant range to provide compensation."[118]

C. Retractions—An Area of Common Ground?

Retractions are an area of libel law that is "ripe for reform," according to a number of media analysts.[119] In addition to the many divergent provisions among current retraction statutes, some are clearly obsolete under the *New York Times* and *Gertz* criteria.[120] The general provisions of the Uniform Defamation Act's retraction provisions, however, compare favorably to the most speech-protective features of a number of retraction statutes currently on the books.[121] There are, however, disagreements over the Act's specifics.

The Act requires a retraction to be "timely and sufficient."[122] A retraction is considered timely if it is published within thirty days of the receipt of a request. A retraction is considered sufficient if it "is published in a manner and medium reasonably calculated to reach substantially the same audience as the publication complained of" and corrects the challenged statement, or disclaims any intent to have communicated an implied meaning.[123] If the retraction is published in another medium

117. Hawley Interview, *supra* note 111.

118. Commissioner Harvey Perlman, *Defamation Act: Transcript of Proceedings in Committee of the Whole*, 1991 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 10th Sess., 212 (Aug. 7, 1991).

119. Baron Interview, *supra* note 72; Kaufman Interview, *supra* note 74.

120. *See* SANFORD, *supra* note 31, § 12.3.

121. *See id.* § 12.3.2 to .3.4.

122. UNIF. DEFAMATION ACT, *supra* note 4, § 15.

123. *Id.* The provisions of § 15(b)(2)(iii), which permit a publisher to retract a statement attributed to another person by "disclaim[ing] any intent to assert or to have asserted the truth of the statement," drew sharp criticism from several participants at the drafting committee's October 1992 public hearing on the Act. One publisher of weekly newspapers in Tennessee stated, "We would be laughed out of town if we suddenly announced we never intended our readers to take a story as true." Sam D. Kennedy, Publisher of the *Parsons News Leader*, *Lawrence County Advocate* and *Waverly News Democrat*, Testimony before the Uniform Defamation Act Drafting Committee, Washington, D.C. (Oct. 9, 1992).

to meet the thirty-day requirement, it must also be published in the next issue or edition, if any, of the original publication.[124]

A timely and sufficient retraction under the Act will completely bar an action for vindication.[125] The defendant in an action for damages may make a termination offer in which he agrees to publish a retraction and pay the plaintiff's litigation expenses, including attorney fees. A plaintiff who does not accept the offer is limited to pecuniary damages and may not recover his litigation expenses.[126] The defendant in a damages action may further limit damages by publishing a sufficient retraction either unilaterally or within thirty days after the receipt of a request, which will limit the plaintiff to recovery "for pecuniary loss caused before the date of the retraction."[127]

A request for a retraction is generally required as a precondition to suit.[128] To be adequate, a request must be in writing and "identify with particularity the publication and the specific statements alleged to be false and defamatory."[129] However, service of a complaint, which has the same specificity requirements as a request for a retraction,[130] will in all cases constitute an adequate request.[131]

The timeliness and sufficiency requirements for retractions concern critics of the Act. "The retraction section presents genuine difficulties for anyone who's involved in publishing at greater intervals than a week or two," said Bob Hawley, Associate General Counsel for The Hearst Corporation.[132] "They are going to have a real hard time meeting the thirty-day requirement." Mr. Hawley questioned how a film maker or the publisher of a book would retract. Even with a monthly publication, lead times for printing would make it difficult to meet the thirty-day deadline.[133]

The drafting committee concedes that the timeliness and sufficiency requirements could be problematic for narrowly focused, infrequent, or one-time publications.[134] In such cases, "the [Act's] focus on reasonable

124. UNIF. DEFAMATION ACT, *supra* note 4, § 15.

125. *Id.* § 14.

126. *Id.* § 12.

127. *Id.* § 14 and cmt.

128. *Id.* § 13 cmt.

129. *Id.* § 13(a)(2).

130. *See id.* § 4.

131. *Id.* § 13(b). The comment to Section 13 explains that this provision was included to "avoid the preclusive effect of an inadequate earlier request or a failure to seek a retraction for any other reason."

132. Hawley Interview, *supra* note 111.

133. *Id.*

134. UNIF. DEFAMATION ACT, *supra* note 4, § 15 cmt.

efforts to reach the same audience will be important."[135] The drafting committee offers the following example as guidance:

> For a book currently being sold, with no next edition in sight, reasonable efforts to retract might involve several measures. The publisher could make necessary corrections in any future editions; notify persons who have purchased the book, if that information is available, or instead attempt through a notice at bookstores or a press release to reach this group; and provide through an insert or other warning notice to those persons who will, in the future, buy the current edition. The latter step assumes, of course, that future reputational harm can be avoided by such an insert rather than by recalling and correcting books that are on the shelf but unsold.[136]

Even with such guidance, "you will not know what is sufficient until there's a body of law built up," said Mr. Hawley.[137] "There's going to be a whole sidebar of litigation that concerns retractions," he predicted, "and those of us who practice law in this area aren't going to know what that means for ten years."[138] Furthermore, "if a judge rules [your effort] is not sufficient, you've lost your timeliness, because it's now advanced well beyond thirty days."[139]

Another problem is the practical difficulty of limiting damages to pecuniary loss caused before the date of retraction. The drafters note that while the Act "attempts to cut off" damages caused after the retraction, it does allow for the recovery of damages caused prior to, but extending beyond, the date of the retraction.[140] Considering the practical difficulties this provision would present to a jury,[141] one has to question how much added protection it affords a defendant.

Yet another problem is the Act's requirement that when a retraction concerns a statement attributed to another person, it must identify that person in order to be considered sufficient, even if the original publication did not do so.[142] Such a requirement directly conflicts with the shield laws adopted in about half the states. Some of these laws confer upon

135. *Id.*

136. *Id.*

137. Hawley Interview, *supra* note 111.

138. *Id.*

139. *Id.* A retraction will be judged sufficient, however, if a plaintiff has so stated in writing. UNIF. DEFAMATION ACT, *supra* note 4, § 15(c).

140. *Id.* § 14 cmt.

141. The illustration provided by the drafting committee highlights these difficulties:

> [I]f a physician is defamed and a retraction thereafter made, the physician should be able to recover damages for economic loss stemming from the loss of patients prior to the date of the retraction, even though that loss may continue for some period after the retraction. On the other hand, economic losses resulting from patients who changed doctors after the date of a retraction should not be recoverable, even though their decision was based upon the original defamation.

Id.

142. UNIF. DEFAMATION ACT, *supra* note 4, § 15(b)(2)(iii) and cmt.

members of the news media an absolute immunity against the forced disclosure of a confidential source in any legal proceeding,[143] while others confer a qualified immunity against disclosure, which can be overcome by a showing of need for the information.[144]

Still other states have adopted by court decision a qualified privilege against disclosure based upon Justice Powell's concurring opinion in *Branzburg v. Hayes*.[145] Lower courts have generally interpreted *Branzburg* as requiring a qualified privilege against the disclosure of sources by members of the news media.[146] Therefore, the Act's provision that a retraction must reveal the source of a challenged statement in order to be considered sufficient raises constitutional questions.

Additionally, the disclosure requirement offers an opportunity for plaintiffs to punish the press when confidential sources are used. Defendants caught in this situation could be forced into a vindication action because they cannot in good faith retract the statement, and they would have a difficult time prevailing in court. With the potential penalty of paying all litigation expenses and publication expenses of the court's findings, such a conflict could have a chilling effect on speech.

Dean Perlman explained that the provision was added for situations in which the press would want to opt out of a vindication action because it has no interest in defending the truth or falsity of the statement. Rather, the important fact was that the statement was made about the plaintiff. In order to allow the press to opt out of a vindication action in such situations, the drafting committee decided that plaintiffs at least should be informed "who they ought to go after."[147]

"There might or might not be a conflict [with current shield laws], depending upon whether giving somebody a choice and then essentially depriving them of [that] choice is a punishment," said Dean Perlman.[148] "There are always costs associated with asserting privileges and you don't have to retract. You can play it all the way to the hilt, and that's just one of the choices that the press might have to make."[149]

143. Pennsylvania is among those states that confer an absolute privilege against disclosure. *See* 42 PA. CONS. STAT. ANN. § 5942 (1982).

144. SMOLLA, *supra* note 9, § 12.06[2][b].

145. 408 U.S. 665 (1972). Lower court interpretations of *Branzburg* have generally regarded Justice Powell's vote as controlling in the 5-4 decision and have adopted his qualified privilege standard. SMOLLA, *supra* note 9, § 12.06[2][a][ii].

146. *See* SMOLLA, *supra* note 9, § 12.06[2][a][ii] n.145 (note 145 contains a list of decisions following this position).

147. Telephone Interview with Harvey S. Perlman, Chair of the Uniform Defamation Act Drafting Committee and Dean of the University of Nebraska College of Law (Apr. 16, 1992).

148. *Id.*

149. *Id.*

D. Privileges

With but a few changes, the Uniform Defamation Act seeks to codify presently recognized privileges to publish defamatory speech.[150] These privileges protect defendants from otherwise actionable defamation claims.[151] Like the later constitutional protections, these common law privileges "grew out of a recognition that in certain circumstances the social interest in the free flow of information is so important that allowance for mistakes must be made, even at the expense of leaving the victims of defamatory speech remediless."[152]

Under the Act, absolute privileges can be raised in order to totally foreclose both damage and vindication actions.[153] Conditional privileges, however, cannot bar an action for vindication under the Act, and are subject to defeasance in an action for damages if the plaintiff proves abuse of the privilege by clear and convincing evidence.[154]

1. Absolute Privileges

Of the Act's absolute privileges to be discussed here,[155] the first concerns statements made by participants "in and pertaining to" judicial proceedings, legislative proceedings, or any quasi-judicial or quasi-legislative executive or administrative proceeding.[156] The common law rationale behind this privilege is to encourage participants in government and its proceedings to speak openly without fear of defamation liability.[157]

If, regarding judicial proceedings, the intent of the drafting committee was to include within the privilege extrajudicial statements to other participants in the proceeding, as well as to potential participants in anticipation of legal action, the Act would be in line with current law.[158] The Act's treatment of legislative speech, limiting the absolute privilege to statements uttered during official proceedings, is consistent with current law, although the Act leaves open to interpretation the particular individuals to whom the protection extends.[159] Moreover, the drafting

150. *See* UNIF. DEFAMATION ACT, *supra* note 4, § 16 cmt., § 17 cmt.

151. SMOLLA, *supra* note 9, § 8.01[1].

152. *Id.*

153. UNIF. DEFAMATION ACT, *supra* note 4, § 16 and cmt.

154. *Id.* § 3 and cmt., § 17 and cmt.

155. Statements communicated between husband and wife as well as statements published with the consent of the person harmed are also listed as absolutely privileged. *Id.* § 16(3), (4).

156. *Id.* § 16(1).

157. SMOLLA, *supra* note 9, § 8.01[2].

158. *See* SANFORD, *supra* note 31, § 10.4.2.

159. UNIF. DEFAMATION ACT, *supra* note 4, § 16 cmt. *See also* SANFORD, *supra* note 31, § 10.4.4 (some states extend the privilege to the proceedings of city councils and other subordinate legislative bodies).

committee specifically states that its intention is not to foreclose additional absolute privileges rooted in other statutory or constitutional provisions,[160] such as the broad immunity for defamatory speech by federal executive and administrative officers under *Barr v. Matteo*.[161]

The second absolute privilege of special interest to the press is referred to in the common law as the fair report privilege.[162] The Act's version of the fair report privilege is more narrow than the common law. The Act bars actions regarding statements that constitute "a fair and accurate report of an official action or proceeding of a governmental body, including an order or opinion of a court, or of a meeting of a governmental body which is open to the public."[163] The common law includes in its coverage any meeting open to the public on a matter of public concern, whether or not associated with a governmental body.[164]

The third absolute privilege of special interest concerns statements "required by law to be published."[165] The comment to Section 16 in the Act offers no guidance as to what statements would be covered under this provision. The common law, however, extends protection under the fair report privilege to the fair and accurate publication by third persons of arrest reports, reports filed by government officers and agencies, and other governmental documents.[166] This provision of the Uniform Defamation Act would be in line with the current law if it is meant to extend an absolute privilege to such documents.[167]

Under the common law, the fair report privilege is a conditional privilege.[168] Because the privilege is only lost by a showing that the report was substantially inaccurate or unfair,[169] however, and is not defeated by a showing of malice or actual malice,[170] it is in reality more akin to an absolute privilege.[171] Therefore, the primary practical effect of the Act's denomination of the fair report privilege as an absolute privilege would be to bar statements subject to the privilege from vindication actions.

160. UNIF. DEFAMATION ACT, *supra* note 4, § 16 cmt.

161. 360 U.S. 564 (1959).

162. While the fair report privilege is primarily a rule of state common law, variations of the privilege have been codified in some states. SANFORD, *supra* note 31, § 10.2.

163. UNIF. DEFAMATION ACT, *supra* note 4, § 16(2).

164. *See* RESTATEMENT (SECOND) OF TORTS § 611 and cmt. i (1977).

165. UNIF. DEFAMATION ACT, *supra* note 4, § 16(5).

166. RESTATEMENT (SECOND) OF TORTS § 611 cmts. d, h (1977); SANFORD, *supra* note 31, § 10.2.3.

167. *See* SANFORD, *supra* note 31, § 10.2.3.

168. *See* RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977).

169. *Id.* § 611 cmts. a, f.

170. *Id.* § 611 cmt. b.

171. SANFORD, *supra* note 31, § 10.3.3.

The fair report privilege is important to the press because it offers even broader protection than *New York Times v. Sullivan*[172] and the cases following it. The privilege protects fair and accurate reports even when the publisher knows the reported statement is false. Further, the privilege is not limited to cases involving public officials or public figures as plaintiffs.[173] Indeed, the Restatement asserts that the fair report privilege is constitutionally required when libel litigation concerns an official governmental document, action, or proceeding.[174]

2. Conditional Privileges

The conditional privileges listed in Section 17 of the Act reflect the conditional privileges available at common law.[175] The Act also codifies the constitutional fault standards as conditional privileges in Section 18. Whereas absolute privileges "attach to certain speakers or forums," conditional privileges are situational and are "governed by the interrelationships between the speaker, the listener, the victim, and the content of the speech."[176] Because the speech at stake under the conditional privileges is considered worthy of enhanced, but not absolute, protection, the privileges may be lost through abuse.[177]

Under the Act, the defendant bears the burden of proving by a preponderance of the evidence the facts necessary to establish a privilege, while the plaintiff bears the burden of proving by clear and convincing evidence abuse of a privilege.[178] The Act adopts the common law rule for the Section 17 conditional privileges—i.e., that they may be lost by excessive publication, which is defined as unreasonable publication "to persons other than those to whom publication was necessary to serve the interests giving rise to the privilege."[179]

The common law also enabled a conditional privilege to be defeated by a showing of negligence or malice.[180] The Act, however, adopts the Restatement position, requiring proof of actual malice in all cases in

172. 376 U.S. 254 (1964).

173. SANFORD, *supra* note 31, § 10.2.

174. RESTATEMENT (SECOND) OF TORTS § 611 cmt. b (1977) ("If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy."). *See also* SANFORD, *supra* note 31, § 10.2.2.

175. UNIF. DEFAMATION ACT, *supra* note 4, § 17 cmt. *See also* RESTATEMENT (SECOND) OF TORTS §§ 594-98A (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115 (5th ed. 1984).

176. SMOLLA, *supra* note 9, § 8.01[2].

177. *Id.*

178. UNIF. DEFAMATION ACT, *supra* note 4, § 3(2)(i), (4).

179. *Id.* § 17(b)(1). *See also* SMOLLA, *supra* note 9, § 8.07[2].

180. SMOLLA, *supra* note 9, § 8.07[2].

which fault is alleged,[181] whether the privilege has a common law or constitutional basis.[182]

In response to critics of the Act's narrow fair report privilege,[183] Dean Bezanson maintained, "Anything that is reported from a public meeting that might not qualify under the absolute privileges of Section 16, presuming it pertains to a matter of public interest, will be subject to [a conditional] privilege."[184] Given the example of a mall developer who is defamed at a non-governmental public meeting protesting a proposed construction project, Dean Bezanson said this could be privileged as speech to protect the publisher's interests or to protect a common interest between the publisher and recipient.[185]

Dean Bezanson added that the requirement of showing actual malice to defeat a conditional privilege is more protective than current law in most jurisdictions, which would allow the privilege to be lost upon a showing of negligence if the plaintiff is a private figure.[186] This assertion of greater protection can be challenged, however, on the basis that the fair report privilege does not consider fault at all. The only question under the fair report privilege is whether the report is fair and accurate.[187]

The assertion of greater protection also fails to take into account that the press may act as a surrogate for interested members of the public who cannot attend an open meeting on a matter of public concern.[188] Whether the press would obtain whatever protection the speaker possesses in a nongovernmental meeting is an open question.[189] In any case, the lack of a fair report privilege in these situations would probably make an action for damages less amenable to summary judgment.[190]

181. RESTATEMENT (SECOND) OF TORTS § 600 (1977).

182. UNIF. DEFAMATION ACT, *supra* note 4, § 17(b)(2) and cmt., § 18(2) and cmt.

183. *See supra* notes 162-74 and accompanying text.

184. Bezanson Interview, *supra* note 3.

185. *Id. See* UNIF. DEFAMATION ACT, *supra* note 4, § 17(a)(1), (a)(3).

186. Bezanson Interview, *supra* note 3; SMOLLA, *supra* note 9, § 8.07[3][a]-[b].

187. *See* SANFORD, *supra* note 31, § 10.3.

188. *See generally id.* § 10.2.1 (the fair report privilege operates on the rationale that the press merely acts as a substitute for members of the public not in attendance at a public proceeding).

189. In any case, it would appear that the privilege could be lost through "excessive publication" by the press. *See* UNIF. DEFAMATION ACT, *supra* note 4, § 17(b)(1).

190. Under the fair report privilege, the defendant would only need to prove that the report was a substantially accurate and fair rendition of what transpired at the public meeting, thereby eliminating all the discovery that could be required on the issue of fault under the Act. *See* SANFORD, *supra* note 31, § 10.3.

E. Republication—Maintaining the Archaic Rules

While the Uniform Defamation Act's rules on liability for the republication of a defamatory statement are in some ways reflective of current law, in others they are a step backward from the law in some jurisdictions.

The Act adopts the Restatement position that a person who republishes a statement is subject to liability just as if he or she were the original publisher.[191] The evolution of the rule "is probably attributable to the basic instinct in human nature that finds gossipmongers repulsive."[192] The problem, however, is that the rule can "hamstring the press in its coverage of newsworthy events and controversies."[193] Professor Smolla provides the following example in his treatise on defamation law:

> Imagine that two days before an election a local political candidate charges an opponent with having taken a bribe. Imagine that the local newspaper editor is absolutely certain that the charge is a lie—the paper has thoroughly investigated the whole alleged incident and found that it was fabricated. Under the common law republication rules the paper will be deemed to have "adopted" the defamatory falsehood if it publishes the candidate's charge, even if the paper also prints its counterevidence and the other candidate's denials. Furthermore, because the newspaper does not believe in the truth of the charge, it is technically publishing with actual malice—knowledge of falsity.
>
> . . . The editor would of course maintain that the charge is newsworthy, for the very making of such a false charge signifies the dishonesty of the candidate who made it. . . . For better or for worse, most editors in the United States would probably run the story, presenting both the defamatory statements and the counterevidence and denials. The common law position would subject the newspapers managed by these editors to liability for defamation.[194]

Due to the inadequacy of the common law republication rules, the judicial doctrine of "neutral reportage" has slowly been gaining acceptance[195] since it was first articulated in *Edwards v. National Audubon Society*.[196] The neutral reportage privilege protects the press when it "accurately and disinterestedly" reports newsworthy charges of a serious nature leveled against a public official or public figure involved in some

191. UNIF. DEFAMATION ACT, *supra* note 4, § 19 and cmt.; RESTATEMENT (SECOND) OF TORTS §§ 578, 581 (1977). The rule only applies to the issue of publication. The republisher still retains the constitutional fault protections. SMOLLA, *supra* note 9, § 4.13[1][c].

192. SMOLLA, *supra* note 9, § 4.13 n.281.

193. *Id.* § 4.14[1].

194. *Id.*

195. *Id.* § 4.14[4]. Professor Smolla notes, however, that some jurisdictions have rejected the doctrine as going beyond the constitutional privileges of *New York Times* and *Gertz*, and other courts have expressed skepticism about the doctrine's basis. *Id. See generally* Scott E. Saef, *Neutral Reportage: The Case for a Statutory Privilege*, 86 NW. U. L. REV. 417 (1992).

196. 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977).

controversy, when the charges are made by another public official or public figure or a prominent organization.[197] Professor Smolla has commented that the privilege "contributes significantly to the free flow of information concerning public controversies," yet is not "gratuitously generous to the media" because of the clearly defined parameters given the doctrine by courts.[198]

An early version of the Uniform Defamation Act contained a narrow neutral reportage privilege, protecting the republisher when the reputational harm from the statement was not foreseeable and the source of the information was credible and was divulged.[199] This explicit neutral reportage privilege was deleted from the Act "not because nobody liked it, but because it would be completely unnecessary," said Dean Bezanson.[200] At the drafting committee's meetings, the libel defense lawyers who were acting as liaisons to the committee raised a number of situations which they said illustrated the need for a neutral reportage privilege, Dean Bezanson related. All of the situations they raised, however, would be protected under the conditional privileges of Sections 17 and 18, which require a showing of actual malice, he claimed.[201]

"I don't think [the neutral reportage privilege] is in there explicitly, and I don't think it's in there as broadly [as some] would want it in there," Dean Perlman commented.[202] "The fact is that the majority of the [drafting] committee didn't want it in there as broadly as the press wanted it."[203]

The even narrower wire service privilege also was not included in the Act. This privilege shields newspapers and broadcasters from liability for republications originating with a news-gathering agency.[204] The wire service defense is generally available when the following four elements are established:

> (1) The defendant received a wire release from a reputable news gathering agency; (2) the defendant did not actually know the story was false; (3) nothing on the face of the story itself reasonably would have alerted the defendant that the story may be incorrect; and (4) the defendant reprinted the wire release without substantial change.[205]

The drafting committee stated that a specific wire service privilege was not included in the Act because "constitutional privileges have made

197. SMOLLA, *supra* note 9, § 4.14[3].
198. *Id.* § 4.14[4].
199. UNIF. DEFAMATION ACT § 7-101 (Draft, July 13-20, 1990).
200. Bezanson Interview, *supra* note 3.
201. *Id.*
202. Perlman Interview, *supra* note 147.
203. *Id.*
204. SMOLLA, *supra* note 9, § 4.13[1][d].
205. *Id.*

it unnecessary."[206] The Libel Defense Resource Center points out, however, that if the drafting committee intended for a wire service privilege to be covered under the Act, an express provision seems appropriate in light of "the Supreme Court's recent disinclination to read additional privileges into the constitutional rule of actual malice."[207]

Although Dean Bezanson maintained that including "redundant" provisions in the Act would only "breed confusion,"[208] an argument can be made that *not* including such a provision would in fact be confusing. The drafting committee describes the wire service privilege as "the protection of a person who provides a means of publication for a privileged publisher."[209] Does this mean that the drafting committee only intends to give the republisher in a wire service privilege scenario the level of protection held by the original publisher? If so, it would seem to place a large burden on the republisher to ascertain whether the original publisher is covered under one of the Act's privileges before publishing.

On the other side of the coin, the Act's provisions regarding liability of the original publisher are in line with the common law's general rule that the original publisher is liable if the republication was "reasonably foreseeable."[210] However, the Act does provide several safe harbors for the original publisher, e.g., if the original publisher made a sufficient retraction prior to the republication, or if the original publisher did not publish with actual malice and requested the republisher, before the republication, not to publish.[211] These exceptions would not appear to provide much protection for the original publisher in a breaking news situation, however, in an age when news reports are broadcast almost instantaneously over television and radio or appear in the next edition of a newspaper within a matter of hours.

A final problem in the republication area appears to be the Act's adoption of the current minority position on the limitation of libel actions, i.e., a rule based on the plaintiff's discovery of the publication.[212] Under the Act, a claim may be brought against a publisher within five years of a publication or, in the case of a republication, within ten years

206. UNIF. DEFAMATION ACT, *supra* note 4, § 17 cmt.

207. *Follow-Up Report*, *supra* note 27, at 8 (citing Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2436 (1991), and Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990)).

208. Bezanson Interview, *supra* note 3.

209. UNIF. DEFAMATION ACT, *supra* note 4, § 17 cmt. Furthermore, the wire service privilege does not come under the Act's Section 21 protections for information retrieval services such as libraries and electronic databases. *See id.* § 21.

210. *Id.* § 20; SMOLLA, *supra* note 9, § 4.13[2].

211. UNIF. DEFAMATION ACT, *supra* note 4, § 20.

212. SANFORD, *supra* note 31, § 13.2.4 ("The time period for statute of limitations purposes generally begins running on the day following the date of publication.").

of the original publication.[213] Within these limitation periods, however, "a claim is barred one year after the plaintiff knew or should have known of the publication or republication."[214]

The limitations period in most situations has been clarified by the drafting committee's recent explanation that "a discovery provision should have no significant effect in most [media] cases, as it should be interpreted as justifying the conclusion that the plaintiff 'should have known' of the story at the time of its publication."[215] Similarly, at least one state that has adopted the discovery rule for some situations does not apply it in defamation actions involving the media.[216]

Cases involving republications are more complex. The drafting committee does not explain whether the period during which the plaintiff 'should have known' of the publication, and hence during which the original publisher can be held liable, begins running at the time of the original publication or upon republication.[217] If the latter, such a rule could have an adverse impact on all media, because reporters' notes and tapes become harder to locate over time. The effects of such a rule would be especially egregious for small radio and television stations, where retaining broadcast tapes within current shorter limitations periods[218] is already a problem.[219] In addition, many television stations and networks have cooperative agreements, through which they freely share material.[220] A limitations period that begins running upon republication could open many of these outlets to long periods of liability.

III
The Prognosis for Change

A. General Reactions to the Act

Overall media reactions to the Act take the form of three general criticisms: that the Act is based upon a faulty premise, that the provi-

213. UNIF. DEFAMATION ACT, *supra* note 4, § 25(a).

214. *Id.* § 25(b).

215. *Id.* § 25 cmt. This comment was first included in the December 6, 1991, draft.

216. *See* Kelley v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976) (adopting the discovery rule for defamatory credit reports, but not where a defamation is made a matter of public knowledge through print or broadcast media).

217. *See* UNIF. DEFAMATION ACT, *supra* note 4, § 25 and cmt.

218. Nearly half the states have a one-year limitations period, and only seven states have limitations periods exceeding two years, with four years being the longest. *Report of the Libel Defense Resource Center on the [Uniform] Defamation Act*, at 77 (June 25, 1990) [hereinafter *Report on the [Uniform] Defamation Act*].

219. Telephone Interview with Steve Bookshester, Associate General Counsel for the National Association of Broadcasters (Mar. 23, 1992).

220. *Id.*

sions of the Act are weighted toward plaintiffs, and that even an acceptable Act could not be kept intact in state legislatures.

1. The Premise

As discussed in the Introduction, much of the empirical evidence underlying the action for vindication is based upon the findings of the Iowa Libel Research Project. This study found that many libel plaintiffs were more interested in vindication of their names than in recovering monetary damages.[221] "I think if you asked a libel plaintiff if he is in it for the money, the natural instinct of any person under those circumstances is to deny that and to say . . . 'All I want is for my reputation to be vindicated,' " commented Bob Hawley.[222]

Others have criticized the Iowa Project for basing its conclusions upon retrospective interviews, when most plaintiffs had already lost their suits. After the fact, "[i]t was thus easy for the plaintiffs to be reflective, revisionist and more reasonable in their attitudes," commented the LDRC.[223]

While acknowledging these weaknesses, Dean Bezanson said, "We have never attempted to put an exact percentage on the number of plaintiffs, or even the specific typology of plaintiffs, who seek vindication as opposed to monetary damages. We've rather tried to be careful to say that what we know indicates . . . many . . . plaintiffs are principally interested in vindicating their reputations."[224]

Vindicatory motivations can quickly be converted to a lawsuit for monetary damages based upon the media defendant's response to the offending statement and the plaintiff's need to receive some sort of financial return once a libel suit is undertaken, Dean Bezanson explained. The pattern of plaintiff responses concerning their initial motivations and how those motivations changed over time gave the study directors "even more confiden[ce] in the fundamental reliability of what we were told," said Dean Bezanson.[225]

The Iowa Project recently completed a second study to determine "when and under what circumstances the parties in media libel suits would agree to drop court action and to divert disputes to mediation and/or arbitration."[226] The Libel Dispute Resolution Program made contact with attorneys in 128 cases at the pretrial stages of litigation from

221. *See supra* notes 16-19 and accompanying text.

222. Hawley Interview, *supra* note 111.

223. *Report on the [Uniform] Defamation Act*, *supra* note 218, at 10.

224. Bezanson Interview, *supra* note 3.

225. *Id.*

226. IOWA LIBEL RESEARCH PROJECT, LIBEL DISPUTE RESOLUTION PROGRAM 1 (Nov. 10, 1991) (press release).

mid-1987 through the end of 1990.[227] In just fifteen of these disputes were both parties interested in using the program, with both parties in nine cases expressing serious interest. In only five of the cases did both parties agree to submit their disputes to the program.[228]

Furthermore, the study found that defendants had a greater interest than plaintiffs in this alternative dispute resolution ("ADR") program, by a margin of thirty-eight percent to twenty-six percent. The program directors explained that since plaintiffs would be required to dismiss their suits in order to participate in the program, they were more often pressed to state whether they had any interest, which might account for the difference.[229]

The attorneys in these cases, many of whom had a financial stake in the outcome[230] and were accustomed to settling disputes through litigation, were not only "instrumental in the decision whether to accept or reject the program," but, "in some instances, had not informed clients of the availability of the option."[231] The program directors also noted how the parties' interests in a nondamage remedy shifted as one party gained some tactical advantage over the other.[232]

Dean Bezanson said that the most recent study confirms how important it is to reach parties early on, before litigation progresses very far, for nondamage remedies to be effective.[233] Indeed, the program directors suggest that "editors and news directors are in a key position to propose ADR when an impasse is reached with complainants," before attorneys become involved in the dispute.[234]

Furthermore, the program directors "saw the same . . . pattern of responses before trial and at the early stages of litigation as we did retrospectively in the earlier study," Dean Bezanson said.[235] "So I think if anything, the second study confirms the earlier findings about plaintiff motivations."[236]

Others interpret the results of the Iowa Project's Libel Dispute Resolution Program differently. "I think the results of the Iowa study are

227. *Id.* at 2. Eighty percent of these contacts were initiated by the program staff. *See id.*

228. *Id.* at 3. A number of the cases in which both parties expressed interest were subsequently settled prior to any work with the program, with several attorneys in these cases saying that contact between the parties initiated through the program facilitated settlement. *Id.*

229. *Id.* at 4.

230. Seventy-three percent of plaintiffs' attorneys in the original Iowa Libel Research Project were retained on a contingency fee basis. BEZANSON ET AL., *supra* note 1, at 69.

231. IOWA LIBEL RESEARCH PROJECT, *supra* note 226, at 5.

232. *Id.* at 4.

233. Bezanson Interview, *supra* note 3.

234. IOWA LIBEL RESEARCH PROJECT, *supra* note 226, at 5.

235. Bezanson Interview, *supra* note 3.

236. *Id.*

. . . at least supportive of our skepticism of the plaintiff's interest in this sort of thing," said Henry Kaufman, General Counsel for the Libel Defense Resource Center.[237]

"I don't think vindication is what plaintiffs are generally looking for. They want to punish publishers. They want money," said Sandy Baron.[238] In her experience, "sometimes the guy you retract sues anyway."[239]

Although merely anecdotal, a recent case seems to confirm Ms. Baron's experiences. *Ertel v. The Patriot News Co.*[240] has its roots in a newspaper article that questioned the prosecution's conduct in a notorious murder case.[241] The article was based on an investigation and report by a prominent defense attorney hired by the convicted man's family, in which the attorney concluded that the family's claim of "manipulation and/or tampering of evidence has significant merit."[242]

The article, while noting that Mr. Ertel prosecuted the case as a former district attorney, did not accuse him of any personal misconduct. Furthermore, the article noted that every appeal of the conviction over eleven years had been unsuccessful.

Not only did the newspaper later retract "any and all implications that Allen Ertel . . . acted improperly when he prosecuted Kim Lee Hubbard," but it also provided Ertel reply space.[243] Furthermore, the newspaper ran both the retraction and reply in the exact same location where the original article was published.[244] Nevertheless, Mr. Ertel sued. The trial court granted the newspaper's summary judgment motion.[245] On appeal, the Pennsylvania Superior Court reversed the lower court and remanded the case for trial.[246]

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237. Kaufman Interview, *supra* note 74.

238. Baron Interview, *supra* note 72.

239. *Id.* Indeed, in the original Iowa Project study, the second most-frequently cited reason why plaintiffs sued was to punish the press. *See supra* note 19.

240. No. 1908 Philadelphia 1991 (Pa. Super. Ct., Nov. 17, 1992)(mem.), *reargument denied*, Jan. 29, 1993.

241. Dick Sarge, *Lawyer Questions Man's 1974 Murder Conviction*, SUNDAY PATRIOT-NEWS, June 30, 1985, at B1.

242. *Id.*

243. *See Patriot-News Company Apologizes to Allen Ertel*, SUNDAY PATRIOT-NEWS, July 7, 1985, at B1.

244. *Id.*

245. Ertel v. The Patriot News Co., No. 2145 Civ. (Pa. Ct. C.P. Phila. County, May 10, 1991).

246. Ertel v. The Patriot News Co., No. 1908 Philadelphia 1991 (Pa. Super. Ct., Nov. 17, 1992)(mem.), *reargument denied*, Jan. 29, 1993. Significantly, the court held that the newspaper's retraction provided evidence of actual malice. *Id.*, slip op. at 20-21.

2. Act Favors Plaintiffs

Even if the drafting committee were to convince the press that the action for vindication is a sound idea, the committee would still be faced with the overwhelming perception that the Act is weighted toward plaintiffs. "The Act basically [adopts] . . . either a middle of the road or somewhat conservative doctrine," said Rodney Smolla, the ABA's advisor to the drafting committee.[247]

"[I]t might fairly be said that the Drafting Committee's approach too often errs, if not at every possible juncture, in favor of the libel plaintiff," the LDRC similarly commented about an early draft of the Act.[248]

Indeed, the Act often adopts the minimum protections required under the Constitution. In addition to the provisions previously discussed, the Act requires that the plaintiff prove falsity by a preponderance of the evidence,[249] instead of by clear and convincing evidence, as many courts have held.[250] Furthermore, the Act follows *Milkovich v. Lorain Journal Co.*[251] by recognizing no special opinion privilege.[252] However, the drafting committee declined to include an explicit fair comment privilege,[253] which some commentators contend could take on renewed vitality following *Milkovich*.[254]

In fairness to the drafting committee, thoughtful reasoning stands behind each decision.[255] On balance, however, it does seem that most of

247. Smolla Interview, *supra* note 81.

248. *Report on the [Uniform] Defamation Act*, *supra* note 218, at 33.

249. In Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767 (1986), the Court declined to consider the standard of proof a libel plaintiff must meet in order to establish a challenged statement's falsity. *Id.* at 779 n.4.

250. *See, e.g.*, Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Robertson v. McCloskey, 666 F. Supp. 241, 248 (D.D.C. 1987); Sharon v. Time Inc., 609 F. Supp. 1291, 1295 (S.D.N.Y. 1984); Pape v. Time Inc., 294 F. Supp. 1087, 1088 (N.D. Ill.), *rev'd on other grounds*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971); Whitmore v. Kansas City Star, 499 S.W.2d 45, 49 (Mo. Ct. App. 1973).

The most recent working version of the Act, however, would require that falsity be proven by clear and convincing evidence. *See* UNIF. DEFAMATION ACT § 2-106 (Tent. Draft, Oct. 21, 1992 (1/05/93 Revision)).

251. 110 S. Ct. 2695 (1990).

252. *See* UNIF. DEFAMATION ACT, *supra* note 4, § 2 cmt.

253. *See id.* § 17 cmt. Generally, the fair comment privilege "attaches to comments made on matters of public interest, based upon facts presented as part of the communication or else publicly available, and made honestly and without malice." SANFORD, *supra* note 31, § 5.2.

254. Courts could choose "to give opinions broader common law 'breathing space' than is strictly necessary under the first amendment through more expansive interpretations of the common law fair comment doctrine." SMOLLA, *supra* note 9, § 6.02[4][a]. For decisions in which courts have done just that *see* Cassidy v. Merin, 582 A.2d 1039, 1046-48 (N.J. Super. Ct. App. Div. 1990); Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1281-82 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

255. Dean Bezanson contends, for instance, that requiring proof of falsity by clear and convincing evidence would be both unfair and "unwise as a matter of policy because plaintiffs

these decisions are reached in favor of plaintiffs. "Anytime in which you're trying to strike a compromise between two basic interests, it's just an individual perception about whether the tradeoff is an appropriate one," said Dean Perlman.[256] "There are pieces of the puzzle that are in the interest of both sides of the controversy, and whether the press . . . believes they're getting enough is up to them. I think they're getting plenty."[257]

3. Change in State Legislatures

Steve Bookshester of the National Association of Broadcasters contends that "there's no such thing as a uniform Uniform Act." He subscribes to "the let loose the dogs of war theory," meaning that "once you set this thing [the Uniform Defamation Act] loose in the legislative process, you just can't control it."[258]

Debating the merits of the Uniform Defamation Act in fifty different state legislatures is "a situation we never want to have to face," said Henry Kaufman.[259]

These fears are based on the lack of any guarantee that a reform proposal "would stay 'as written' when it reaches the legislative arena," notes one commentator.[260] "Upsetting the delicate tradeoffs underlying a reform act might well create a law with significant chilling effects on press freedom."[261]

Such changes would not only defeat the commissioners' own goal of uniformity, but also exacerbate the problems of forum shopping[262] and the potential explosion of "sidebar litigation" over the meaning of the Act's provisions, which some critics predict will follow its enactment.[263] Assuming that some balancing of interests could be agreed upon by the parties, the risk of state legislatures' upsetting that balance creates the

in most libel suits are required to prove a negative," e.g., that they are "not a crook." Furthermore, he said, the defendant's behavior should not be an issue in a vindication action, because fault is not relevant. Therefore, the defendant's actions should not sway the jury in reaching its determination regarding truth or falsity. Bezanson Interview, *supra* note 3.

256. Perlman Interview, *supra* note 147.

257. *Id.*

258. Bookshester Interview, *supra* note 219.

259. Kaufman Interview, *supra* note 74.

260. Dienes, *supra* note 1, at 15.

261. *Id.* Although the author was here discussing the Annenberg Libel Reform Act, his point is equally applicable to the Uniform Defamation Act.

262. *See* Anderson, *supra* note 1, at 546 n.225 and accompanying text. *See also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); SMOLLA, *supra* note 9, § 12.03[7].

263. Hawley Interview, *supra* note 111.

potential for "constitutional offenses that require years of effort to undo and that inhibit fundamental freedoms until undone."[264]

B. The Chances for Passage

Not surprisingly, media support for the Act is practically non-existent. There was some talk of one or two electronic publishers publicly endorsing an earlier draft of the Act that excluded punitive damages, but that support evaporated when the punitive damages alternative was reinstated.[265]

Even Dean Perlman, Chair of the Drafting Committee, urged the full Conference of Commissioners to eliminate punitive damages in order to preserve "some glimmer of hope that the press and other defendants would find this [A]ct suitable."[266] Questioned more recently on this viewpoint, Dean Perlman replied, "I still believe that."[267]

"If the Commissioners were to adopt the Act as it substantially is now . . . there's no doubt in my mind that with or without the [elimination of] punitive damages, you can expect the organized media bar to be eighty percent lined up against this," Professor Smolla commented.[268] "Experience tells us that it's very, very difficult to modify the legal regime in any industry against that much industry opposition, particularly when you're dealing with constitutional issues."[269]

Professor Smolla surmises that the Act would have a better chance of garnering media support if, in addition to eliminating punitive damages, the vindication option would require the consent of both parties to the action.[270] Others agree with this assessment.[271]

"I wouldn't jump at that too quickly," Dean Perlman replied when asked about the lack of any apparent media support for the Act.[272] "I would say that most lawyers who represent national media are against it.

264. *Report on the [Uniform] Defamation Act*, *supra* note 218, at 28.

265. Milam Interview, *supra* note 83. Dun & Bradstreet recently stated its support for the Act, so long as the Act's current provisions remained intact in state legislatures. Letter from A. Buffum Lovell, Senior Vice President and General Counsel, Dun & Bradstreet, Inc., to Harvey S. Perlman, Chair of the Uniform Defamation Act Drafting Committee, at 1 (August 12, 1992).

266. Commissioner Harvey Perlman, *Defamation Act: Transcript of Proceedings in Committee of the Whole*, 1991 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 9th Sess., 94 (Aug. 6, 1991). Dean Perlman later warned the commissioners that without the ban, further drafting might become an "academic exercise." Perlman, *supra* note 118, at 210.

267. Perlman Interview, *supra* note 147.

268. Smolla Interview, *supra* note 81.

269. *Id.*

270. *Id.*

271. *See* Dienes, *supra* note 1, at 18.

272. Perlman Interview, *supra* note 147.

I don't think that you can say more than that unless you've done a broader survey."[273]

Dean Bezanson is hoping to engage the attention and support of editors, publishers, and reporters, "those people who are involved in the process that is at stake here."[274] As the costs of defending libel suits continue to grow, which could soon cut into newsroom budgets, he thinks people will realize that the First Amendment is served by reexamining "the disaster that we have for libel law right now and trying to find some better ways to deal with this problem."[275]

Even advocates of libel law reform acknowledge the media's misgivings over such proposals. One commentator writes: "Media skepticism of reform proposals is understandable. They are being asked to trade risks that are generally known, sometimes controllable, and nearly always insurable, for changes whose effects are at least as unpredictable now as the effects of *New York Times* and *Gertz* were when those cases were decided."[276]

In addition, every act adopted by the Uniform Law Commissioners is submitted to the ABA House of Delegates for approval. The House adopts almost every act submitted "because we work closely with the ABA throughout the process" and "come up with a happy medium," said Renee Skower, Administrative Assistant for the National Conference of Commissioners on Uniform State Laws.[277] The Act's chances of passage in the House of Delegates would appear to be problematic, because one ABA advisor, Bob Hawley, has expressed serious reservations about the Act[278] and the ABA's primary advisor, Professor Smolla, has declared that he is "essentially opposed to the Act."[279]

Interestingly, the Act has not garnered support from the organized plaintiffs' bar either. The Association of Trial Lawyers of America has not taken a stand one way or the other on the Uniform Defamation Act.[280] "It's not been a particularly hot issue here," said Madelyn Appelbaum, ATLA's Director of Public Relations.[281]

273. *Id.*

274. Bezanson Interview, *supra* note 3.

275. *Id.*

276. Anderson, *supra* note 1, at 549.

277. Skower Interview, *supra* note 7.

278. *See supra* text accompanying notes 111, 132, 133, 137, 138, 222, and 263.

279. Smolla Interview, *supra* note 81.

280. Telephone Interview with Madelyn Appelbaum, Director of Public Relations for the Association of Trial Lawyers of America (April 27, 1992).

281. *Id.*

IV
Conclusions

Piecemeal change is the best answer to libel law reform.[282] While not as dramatic as a complete overhaul of the law, it offers a better chance of acceptance when experimenting with new remedies, especially in an area of the law as sensitive as libel, with its constitutional overtones.[283]

An action for vindication would help to eliminate the very real problem faced by many plaintiffs who do not have a legal remedy by which to vindicate their reputations. However, such a remedy should be truly optional, requiring the consent of both parties. If, as the proponents of the Uniform Defamation Act submit, many libel plaintiffs would be satisfied with a vindication remedy, then the premise should prove itself out in practice.

Presumably, media defendants would soon readily agree to the option if it proves to be less expensive than current fault-based litigation. If media defendants do balk at using the vindication option merely because of a fear of tarnishing their reputations, that news too would soon be disseminated, and media defendants would be shamed into using the process where appropriate.

A vindication cause of action would likely receive greater acceptance than current mediation and arbitration programs because it would have the imprimatur of the state behind it. Furthermore, plaintiffs and defendants would likely learn about an action for vindication earlier in the process, when such options hold greater promise for settling disputes.

In addition, developing a uniform retraction statute would appear to be an area of libel law ripe for action by the Uniform Law Commissioners. Ideally, such a statute would encourage potential plaintiffs to seek timely retractions and limit them to provable economic losses when they do not. Such a statute would also encourage media defendants to retract by limiting plaintiffs to provable economic losses when a timely retraction is made, thus allowing plaintiffs both vindication and recovery for

282. *See* Dienes, *supra* note 1, at 18.

283. Accepting that some sections of the Act have more appeal than others, the drafting committee has come to much the same conclusion. Following its October 1992 public hearing, the committee set about to divide the Act into four articles—definitions, actions for damages, actions for vindication, and retractions—which can be separately adopted. Bezanson Interview, *supra* note 3 (Jan. 25, 1993). Apart from limitations on fee shifting and a higher standard of proof for falsity, *supra* notes 63, 96, and 255, its provisions remain substantively the same as those in the Feb. 6, 1992, draft. *See* UNIF. DEFAMATION ACT (Tent. Draft, Oct. 21, 1992 (1/05/93 Revision)).

any actual economic losses.[284] Furthermore, a plaintiff should not be permitted to use the publication of a correction as evidence of liability.[285]

Finally, punitive damages should be outlawed. Sufficient evidence exists that many juries already include a punitive element in their generally amorphous compensatory awards. With libel awards now reaching into the tens of millions of dollars, and totalling $190 million in the 1990-91 period alone,[286] the complete elimination of punitive damages would at least slow this substantial danger to freedom of speech.

There is therefore a place for the Uniform Law Commissioners in the reform of libel law, albeit a much scaled back and more balanced one.

284. A retraction statute should, in this author's viewpoint, also include a neutral reportage privilege, which would protect the press in the responsible reporting of any public controversy. *See supra* notes 195-203 and accompanying text. This would protect the media from having to disclaim an intention to assert the truth of statements made by persons involved in these controversies. *See supra* note 123.

285. *See supra* note 246.

286. LDRC RECAP AND UPDATE, *supra* note 13, at 5, 8.

Appendix
Uniform Defamation Act
February 6, 1992, Draft

D R A F T

FOR DISCUSSION ONLY

UNIFORM DEFAMATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

February 6, 1992, Draft

UNIFORM DEFAMATION ACT

With Prefatory Note and Comments

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DRAFTING COMMITTEE ON UNIFORM DEFAMATION ACT

HARVEY S. PERLMAN, University of Nebraska, College of Law, Lincoln, NE 68583, Chair
JACK DAVIES, Court of Appeals, Judicial Building, 25 Constitution Avenue, St. Paul, MN 55155
LEWIS C. GREEN, Suite 1830, 314 North Broadway, St. Louis, MO 63102
JOHN F. HAYES, Suite 260, 335 North Washington, Hutchinson, KS 67504
KATHRYN L. HOVE, 2371 Highway 1, N.E., Solon, IA 52333
ELMER R. OETTINGER, 58 Oakwood Drive, Chapel Hill, NC 27514
MATTHEW S. RAE, JR., 34th Floor, 777 South Figueroa Street, Los Angeles, CA 90071
FREDERICK P. STAMP, JR., U.S. District Court, P.O. Box 791, Wheeling, WV 26003
RANDALL P. BEZANSON, Washington and Lee University, School of Law, Lexington, VA 24450, Reporter
DWIGHT A. HAMILTON, Suite 600, 1600 Broadway, Denver, CO 80202, President (Member Ex Officio)
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, Executive Director
DAVID PEEPLES, Court of Appeals, Bexar County Courthouse, San Antonio, TX 78205, Chair, Division F (Member Ex Officio)

Review Committee

LEWIS V. VAFIADES, P.O. Box 919, 23 Water Street, Bangor, ME 04402, Chair
W. MICHAEL DUNN, P.O. Box 3701, 1000 Elm Street, Manchester, NH 03105
RAYMOND P. PEPE, 11th Floor, 240 North Third Street, Harrisburg, PA 17101

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NATIONAL CONFERENCE OF COMMISSIONERS
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676 North St. Clair Street, Suite 1700
Chicago, Illinois 60611
312/915-0195

UNIFORM DEFAMATION ACT

PREFATORY NOTE

Since the United States Supreme Court recognized the First Amendment limitations on the common law tort of defamation, courts have struggled to find the proper balance between the constitutionally protected guarantees of free expression and the need to protect citizens from reputational harm. In addition new technologies for information distribution have caused tension within the traditional rules of the defamation tort. The Scope and Program Committee recognized, as have other commentators, that the state of the law is in chaos and that some issues may not be fit for judicial resolution.

The central question that animates this draft is whether there is a way to provide additional protection for reputational harm without interfering with legitimate First Amendment concerns. There is empirical evidence to suggest that many targets of defamatory statements would be satisfied with vindication, that is with a determination that the statement was false. A fair reading of Supreme Court jurisprudence suggests that the constitutional privileges accorded speakers in defamation cases are designed to insure that the threat of monetary awards for potentially defamatory statements will not chill speech.

The draft attempts to balance these concerns by affording plaintiffs an option of seeking vindication alone, rather than money damages. In addition, incentives are created throughout the Act to encourage plaintiffs to accept vindication as a complete remedy. The draft also attempts to provide defamation defendants with incentives to respond with retractions or corrections when their published statements are in error.

Finally, and within the framework of still-evolving constitutional doctrine, the draft reflects an effort to bring an important measure of clarity and consistency to the adjudication of defamation actions, and to effect needed changes in such areas as compensatory and punitive damages, privileges, and retraction.

UNIFORM DEFAMATION ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Defamation" means a statement tending to harm reputation.

(2) "Pecuniary damage" means provable economic loss.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity, but does not include a government or governmental subdivision, agency, or instrumentality.

(4) "Publication" means an intentional or negligent communication to a person other than the person alleging reputational harm from the communication.

COMMENT TO SECTION 1

By the definition of "person," which does not include products or services, and by the requirement in Section 2 that a publication harm the reputation of a "person," the Act is made inapplicable to product disparagement or trade libel claims, as well as to the increasing variety of defamation-like false or misleading advertising claims. The definition also excludes from liability under the Act libels of government or governmental bodies, which are constitutionally immune from liability under the First Amendment (as distinguished from libels of public officials, which are not excluded and with respect to which actions may be brought under the Act).

Under Section 1 (4) "publication" is defined as an intentional or negligent communication to a person other than the person alleging reputational harm from a communication. This definition is consistent with the Restatement (Second) of Torts, Section 577 (1). By the requirement that a communication be "intentional or negligent," the definition excludes communications to a third person that are the result of mistake or inadvertence, as long as the mistake or inadvertence is non-negligent. The Act, like the Restatement, includes this qualification as part of the definition of publication, rather

than as a defense to liability, thereby making clear that the concepts of intentional or negligent communication go to the act of communicating, not, as with the privileges contained in Sections 9 (negligence) and Sections 17 and 18 (malice), to the content of a communication.

SECTION 2. ELEMENTS OF CLAIM. A person who causes the publication of a false and defamatory factual statement about another person which harms that person's reputation is subject to liability to that person in an action under this [Act]. Factual statement means a communication that is reasonably understood by recipients to be of a factual nature and is objectively provable or disprovable.

COMMENT TO SECTION 2

A number of features of the Act should be noted in connection with Section 2, which sets out the elements of the legal wrong. First, no distinction is made between slander and libel. The distinction is now largely anachronistic, and the rules of liability per se and related requirements for proof of harm and damage that turned on the distinction are not retained in the Act. All defamations are made subject to the same rules.

Second, no distinction is drawn an the basis of the medium employed in the publication, or the media or non-media identity of the offending publisher. Differences in the impact of a given medium can, of course, be relevant on a case-by-case basis under such headings as audience interpretation of meaning, reputational harm, and damage. The media/non-media distinction, generally employed as a means of distinguishing press or mass communication from private individual communication, is not used in the Act because, while occasionally of analytical utility, it is difficult to define and was considered unnecessary. Private speech is protected equally with public speech under the Act.

The use of the term "factual statement" protects statements of opinion from liability, although not in so many words. By requiring as a condition of liability that a communication be a factual statement, based on reasonable interpretation of the recipient, and that it be disprovable and disproven by the injured party (see Section 3), statements of an

evaluative, judgmental, or general and open-ended character, as well as statements not reasonably understood as factual, are not made actionable under the Act. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

The definition contained in Section 2 follows the approach taken by the Court in Milkovich v. Lorain Journal, 111 L.Ed. 2d 1 (1990). This approach is consistent with, although a somewhat different formulation of, the position taken in the Restatement (Second) of Torts, Section 566 (1977), which provides that "A statement in the form of an opinion . . . is actionable . . . if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." In a related fashion, Section 563 of the Restatement (Second) of Torts provides that "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Both of these ideas have been incorporated in the definition of "fact."

By using "factual statement" to mean information that is "reasonably understood by recipients to be of a factual nature and that is objectively provable or disprovable," the Act avoids the need to define "opinion," or to provide a separate privilege for opinion. The Act therefore departs from the approach taken by many courts prior to the Milkovich case, in which a four or five factor analysis was used to define opinion as a matter of law. Many of the same considerations (such as whether the context of the statement is one ordinarily associated with satire, hyperbole, or pure opinion) will still apply, but they will be more fact-based and dependent on the particular circumstances of each case, and not on presumptive categories of statement.

The Act rests liability on the reasonable understanding or interpretation given a statement. For example, the statement that "it is rumored that X is a thief" could not escape liability simply because the fact of rumors is true. If in its context the statement is interpreted reasonably as implying that X is a thief, that will be the relevant issue in an action under the Act, not simply the correctness of the assertion that rumors exist.

SECTION 3. BURDEN OF PROOF. In an action under this [Act]:

(1) The plaintiff bears the burden of proving by a preponderance of the evidence:

(i) publication;

(ii) defamation;

(iii) harm to reputation; and

(iv) falsity.

(2) The plaintiff bears the burden of proving by clear and convincing evidence:

(i) abuse of privilege;

(ii) negligence; and

(iii) knowledge of falsity or reckless disregard for truth.

(3) The plaintiff bears the burden of proving the amount of damages with reasonable certainty.

(4) The defendant bears the burden of proving by a preponderance of the evidence the facts necessary to establish a privilege.

COMMENT TO SECTION 3

In Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), the Supreme Court held that issues of constitutional fact, such as actual malice and, presumably, negligence, must be proved by clear and convincing evidence. Because abuse of privilege issues, such as common law malice or publication beyond the protected scope of a privilege, are of similar character and importance, the higher standard is applied to these issues, as well.

In outlining the burden of asserting and proving privilege, the Act is intended to reflect the common rule that one who asserts privilege has the burden of raising it and, if questions of fact are involved, of proving them by a preponderance of the evidence. The Act does not, however, purport to allocate factual issues involved in privilege matters between the judge and jury, but rather leaves these issues to local practice.

The plaintiff must prove the fact of damage by a preponderance of the evidence under subsection 1. The Act adopts the Restatement requirement that the amount of damages be proved

with reasonable certainty. This requirement applies, of course, not only to pecuniary and economic damages, but also to damages flowing from harm to reputation.

SECTION 4. PLEADINGS; EXPEDITED PROCEEDING.

(a) In addition to other matters required by [the rules of procedure for civil actions], the complaint [petition] must:

(1) identify with particularity the specific statements alleged to be false and defamatory and the time and place of their publication;

(2) state the alleged defamatory meaning and identify the specific circumstances giving rise to it if the defamatory meaning arises from implication rather than or in addition to ordinary meaning, or from innuendo, sarcasm, or conduct;

(3) state that the alleged defamatory meaning is false;

(4) include a copy of each retraction and each request for retraction; and

(5) identify whether the action brought is one for damages under Section 9 or for vindication under Section 5.

(b) If upon motion by the plaintiff the court finds that the plaintiff is likely to suffer significant additional reputational harm from repetition of the statement, the court may expedite the proceeding.

COMMENT TO SECTION 4

Section 4 provides that a plaintiff filing a complaint under the Act must describe the subject communication in sufficient detail adequately to inform the defendant of the subject of the suit. This section imposes special requirements in defamation actions that extend beyond the requirements generally imposed for all pleadings under state laws. Although some states require particularity of pleading in libel actions, see N.Y. CPLR Law § 3016(a) (McKinney 1974), current law is largely silent on how particularly a cause of action for defamation must be pled. Consequently, in some states a plaintiff may append a copy of a book or a lengthy article to the complaint, accompanied by very generalized allegations, thus forcing the defendant to deduce the part of the publication that is objectionable to the plaintiff. Particularity of pleading makes the defendant immediately aware of the subject of the suit and thus promotes efficiency and facilitates early steps to retract the communication or to settle the suit.

Subsection (a) requires that the exact offending words or conduct be set out in the complaint. A plaintiff may not give a general description of the communication limited by terms such as "to the effect" or "substantially." Furthermore, if only a portion of a communication is actionable, the plaintiff must specify in the complaint the actionable portion.

If the ordinary meaning of the subject communication does not give rise to a cause of action under the Act, but the circumstances surrounding the communication imply a meaning to the communication other than the ordinary meaning, the plaintiff must plead the specific circumstances. In a case involving innuendo, sarcasm, or a statement accompanied by conduct, the plaintiff must state the alleged implicit meaning.

Subsection (b) provides that a plaintiff who alleges continuing injury from a communication that is being repeatedly published may seek to have the proceeding expedited. At least one state currently provides for an expedited proceeding. Cal. Civ. Proc. Code § 460.5 (West 1973). Inclusion of this subsection reflects a judgment that plaintiffs, who are not eligible for injunctions but who nonetheless are being injured by a continuous publication, should have an opportunity to obtain relief earlier than normal litigation procedures would provide. The court, however, is given full discretion in the matter.

SECTION 5. ACTION FOR VINDICATION: REQUIRED PROOF; EXCLUSIVE REMEDY. A person bringing an action under this [Act]

may elect, at the time of filing a complaint [petition], to limit the action to an action for vindication. If the election is made:

(1) the plaintiff must prove the elements stated in Section 2;

(2) the publisher may not assert absence of fault or claims of conditional privilege;

(3) damages may not be awarded; and

(4) except as provided in Section 7(b), the plaintiff may not bring an action for damages for reputational or dignitary injury caused by publication of the false statement.

COMMENT TO SECTION 5

Section 5 provides an alternative cause of action to the traditional action for damages. The cause of action is one for vindication, by which a successful plaintiff can obtain a written and published finding of fact on the question of falsity, but without the opportunity for any form of money damages. Defenses to the action are likewise limited. Claims of absolute privilege can be raised and, if successful, will defeat an action for vindication, but claims of conditional privilege, including constitutional privileges based on negligence or actual malice, may not be raised.

SECTION 6. ACTION FOR VINDICATION: TERMINATION BY DEFENDANT. If at any time within 90 days after service of process in an action for vindication a defendant by motion stipulates on the record that it does not assert the truth of the statement or did not intend to assert its truth at the time of publication, or both, and agrees to publish, at the plaintiff's request, a sufficient retraction, the court shall, after the

required publication, dismiss the action against the defendant making the motion. Neither party may recover attorney's fees or expenses under Section 8.

COMMENT TO SECTION 6

Section 6 provides, in substance, a counterpart to the offer of termination provision contained in Section 12, which is applicable only to actions for damages. The purpose of Section 6 is to permit -- indeed, to encourage -- the termination of a vindication action if the defendant is willing to disclaim any assertion of truth, and to publish that disclaimer. It is important to note that the defendant need not concede falsity. That is something that defendants are rarely willing to do, and are rarely in a position to do. A clear disclaimer of the assertion of truth, however, was judged to provide both significant and realistic relief for a plaintiff.

SECTION 7. ACTION FOR VINDICATION: FINDINGS OF FACT; DEFAULT BY DEFENDANT.

(a) Except as provided in subsection (b), if the plaintiff prevails in an action brought pursuant to Section 5, the court shall enter judgment which shall include written findings of fact on falsity and an order requiring the defendant, at the defendant's option:

(1) to publish the findings in conformance with Section 15(b)(1); or

(2) to pay the plaintiff an amount sufficient to secure their publication in conformance with Section 15(b)(1).

(b) If the defendant makes a motion pursuant to Section 6, but fails within a reasonable time to publish a

sufficient retraction at the plaintiff's request, the plaintiff may:

(1) amend the complaint to assert a claim for damages against the defendant under Section 9; or

(2) introduce evidence of falsity and, if the court finds the proof of falsity adequate, it shall enter judgment which shall include written findings of fact on falsity and order the defendant to pay an amount sufficient to secure publication of the findings in conformance with Section 15(b)(1).

SECTION 8. ATTORNEY'S FEES AND EXPENSES IN AN ACTION FOR VINDICATION.

(a) In an action brought under Section 5, reasonable expenses of litigation, including attorney's fees, shall be awarded:

(1) to a prevailing plaintiff upon proof that the defendant was provided sufficient grounds for retraction in the plaintiff's request for retraction, and that a timely retraction was unreasonably refused; or

(2) to a prevailing defendant upon proof that the plaintiff had no reasonable basis upon which to allege falsity.

(b) An award of expenses and attorney's fees to a prevailing party under this section may not be disproportionate to the reasonable value of those incurred by the other party for its own expenses and attorney's fees.

COMMENT TO SECTION 8

Section 8(a)(2) is the only provision in the Act which permits defendants to receive reasonable expenses of litigation, including attorney's fees. Awarding fees in vindication actions in which plaintiffs allege falsity without reasonable basis seemed appropriate in view of the fact that defendants in such cases are precluded from claiming any but absolute privileges. The potential award of fees was also seen as an effective deterrent against plaintiffs bringing frivolous vindication actions.

The term "expenses of litigation, including attorney's fees" is intended to be inclusive of all costs of litigation, and therefore to be broader than the recovery of attorney's fees and costs. Recoverable expenses could include, for example, the costs of witnesses, experts, travel, and the like.

The amount of recoverable expenses is effectively limited by the requirement that the award be proportionate to the expenses of the party from whom recovery is made. In most cases this will result in setting the amount awarded at a level no higher than the actual expenses of the other party, although the possibility of pro bono representation, for example, led to the use of "reasonable value" in order that free services to one party not defeat a reasonable award to the other party.

SECTION 9. ACTION FOR DAMAGES.

(a) A plaintiff may recover damages in an action under this Act if the plaintiff proves the elements of a cause of action stated in Section 2 and also proves:

(1) in a case involving a conditional privilege, that the defendant published the statement with knowledge of its falsity or reckless disregard for its truth, or

(2) in all other cases, that the defendant knew or reasonably should have known the statement was false.

(b) A plaintiff entitled to recover damages under subsection (a) may recover:

(1) damages for harm to reputation and resulting emotional distress; and

(2) pecuniary damages caused by the publication.

COMMENT TO SECTION 9

Section 9 requires a showing of negligence or, for public official and public figure cases as well as for other cases in which conditional privilege is successfully established, of actual malice, in all cases in which damages are sought. Under current law strict liability still applies to certain, although highly limited, settings of purely private libel. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). The Act reflects the judgment that all speech should be equally protected irrespective of context, that in any event distinctions between fault-based and strict liability are unnecessarily confusing and conducive to litigation, and that the remaining instances of strict liability under the United States Supreme Court's decisions are so narrow as to be of doubtful utility as a matter of policy.

It should also be noted that general or presumed damages are foreclosed under the Act. Moreover, by requiring that damages for emotional distress result from harm to reputation, the Act is intended to foreclose recovery for "pure" emotional distress, and to limit the scope of emotional distress damages recoverable.

The Act uses the term "pecuniary damages," defined in Section 1(2), to describe provable economic or out-of-pocket losses caused by a publication. The term is intended to include the types of damage described variously in state common law as "pecuniary damage," "special damage," "economic loss," or "out-of-pocket loss."

Of course, by virtue of Section 16, which forecloses any action to which absolute privileges apply, no damages may be recovered under Section 10 when absolute privilege is established.

[Alternative A]

[Committee Alternative]

[SECTION 10. PUNITIVE DAMAGES PROHIBITED. Punitive damages may not be recovered in an action under this [Act].]

[Alternative B]

[SECTION 10. PUNITIVE DAMAGES. A plaintiff may recover punitive damages under this [Act] only upon a showing by clear and convincing evidence that the defendant published the challenged statement with knowledge of its falsity and with ill will toward the plaintiff. The provisions of [States should insert a reference to such provisions generally applicable to punitive damages as are appropriate] apply to the award of punitive damages under this section.]

COMMENT TO SECTION 10

Pursuant to the Conference's action in 1991, a punitive damage provision has been drafted in order that a narrow alternative to complete prohibition of punitive damages will be available at the time of final reading. The provision limits punitive damages very strictly to cases in which the plaintiff can prove knowledge of falsity (not reckless disregard for truth) and ill will, or intent to harm.

Notwithstanding the limited nature of the punitive damages provision, the Committee remains convinced that punitive damages should not be available in any cases. The punitive damage provision is therefore presented as an alternative to the committee's recommendation. The action of the Committee of the Whole in 1991 did not amend the Act to require punitive damages, but rather required that an alternative provision allowing punitive damages be drafted for possible consideration at the time of final reading.

SECTION 11. ATTORNEY'S FEES AND EXPENSES IN AN ACTION FOR DAMAGES. In an action brought under Section 9, reasonable expenses of litigation, including attorney's fees, may be awarded to a prevailing plaintiff who:

(1) made an adequate request for retraction within 60 days of publication; and

(2) proves that the challenged statement was published with knowledge of its falsity or reckless disregard for its truth.

SECTION 12. OFFER OF TERMINATION IN AN ACTION FOR DAMAGES.

(a) Any time before trial of an action for damages under this [Act] a defendant, by motion, may make a termination offer. In the motion the defendant shall stipulate on the record that the defendant does not assert the truth of the statement or did not intend to assert its truth at the time of publication, or both, and the defendant shall agree:

(1) to pay the plaintiff's reasonable expenses of litigation, including attorney's fees, incurred prior to the filing of the motion; and

(2) to publish, at the plaintiff's request, a sufficient retraction.

(b) If the plaintiff accepts the offer, the court shall dismiss the action against the defendant after the defendant fully complies with its terms. A plaintiff who does

not accept the termination offer is limited to pecuniary damages and may not recover from the defendant making the offer the expenses of litigation, including attorney's fees.

SECTION 13. REQUEST FOR RETRACTION.

(a) To be adequate, a request for retraction must:

(1) be made in writing and signed by the requester or by the requester's authorized agent;

(2) identify with particularity the specific statements alleged to be false and defamatory and the time and place of their publication;

(3) state the alleged defamatory meaning and identify the specific circumstances giving rise to it if the defamatory meaning arises from implication rather than or in addition to ordinary meaning, or from innuendo, sarcasm, or conduct; and

(4) state that the alleged defamatory meaning is false.

(b) If an adequate request has not previously been made, service of a [summons and complaint [petition]] in conformance with Section 4 constitutes an adequate request for retraction and the time for filing a responsive pleading is suspended during the period provided in Section 15 for responding to the request.

COMMENT TO SECTION 13

The retraction provisions of the Act (Sections 13 - 15) should be read as a whole. These sections represent a

careful balancing of the interests of plaintiffs and defendants, and are designed to encourage the prompt informal settlement of defamation claims.

Section 13 contains the general requirement that a retraction be sought as a precondition to suit. Section 13(b) however, provides that in all cases a complaint shall constitute such a request, thus avoiding the preclusive effect of an inadequate earlier request or a failure to seek a retraction for any other reason. A retraction serves to limit or eliminate the damages caused by a communication. Unlike many current retraction statutes, Section 13 does not require a party to seek a retraction within a certain time period following publication. Cf. N.C. Gen. Stat. § 99-1 (1985); Wis. Stat. Ann. § 895.05 (West 1983). A party may seek a retraction at any time prior to the expiration of the statute of limitations. Sections 11 and 14, however, are designed, respectively, to encourage an early request for retraction, and a favorable response.

Subsection (b) provides that the complaint shall constitute a request for retraction if no adequate retraction has been sought before the action is filed. This provision relieves the plaintiff of the obligation to request a retraction at some point before filing, although the Act is not intended to encourage that procedure. Indeed, Section 11 provides an incentive for an early request, as will, presumably, the plaintiff's own interest in reputational vindication. The principal reason for Section 13(b) is to provide a cure in all cases for potential claims that the request for retraction was deficient in form or content, and for the attendant difficulties such claims might needlessly pose under the statute of limitations.

A publisher who has received a request for retraction prior to the filing of an action, and who considers that request to have been deficient, should therefore consider the complaint to constitute a new request for retraction requiring the publisher's response. Failure to give due notice of the publisher's intent to consider the complaint a request for retraction in such circumstances and, if necessary, to suspend the time for response, should constitute a waiver of any objections to the prior retraction request.

SECTION 14. EFFECT OF RETRACTION. If a timely and sufficient retraction is published, a person may not bring an

action for vindication based on the challenged statement under Section 5, and a person who brings an action for damages under Section 9 may recover damages only for pecuniary loss caused before the date of the retraction.

COMMENT TO SECTION 14

Section 14 is designed to encourage parties to grant a request for retraction by providing that a retraction forecloses an action under Section 5, and that in an action for damages the requesting party may seek only pecuniary damages in the event of the publication of a retraction. Additionally, by refusing the request, a publisher is subject under Section 11 to a possible award of attorney's fees if the requesting party thereafter prevails in an action, proves actual malice, and has sought the retraction promptly.

Consideration was given to a section prohibiting introduction of evidence on the granting or refusal of a retraction in subsequent proceedings. Such a provision was not included because such information should rarely if ever be relevant -- particularly on questions of falsity, negligence, or malice at the time of publication -- under current law, and an absolute ban even for exculpatory uses or extreme cases was deemed unwise.

In limiting recovery of damages for pecuniary loss to those "caused before the date of the retraction," the Act attempts to cut off damage which arises after or is caused after the retraction, but not to prevent the recovery of damages caused prior to the retraction, but which may extend beyond the date of retraction. For example, if a physician is defamed and a retraction thereafter made, the physician should be able to recover damages for economic loss stemming from the loss of patients prior to the date of the retraction, even though that loss may continue for some period after the retraction. On the other hand, economic losses resulting from patients who changed doctors after the date of a retraction should not be recoverable, even though their decision was based upon the original defamation. At a trial of an action in which the defendant has published a retraction in accordance with Section 14, the plaintiff will bear the burden of proving damages caused by the publication before the retraction.

It should be noted that under Section 14 a publisher may unilaterally retract and limit damages to pecuniary loss. This feature is designed to encourage publishers quickly to

correct mistakes and thereby avoid much of the harm that may flow from the publication.

SECTION 15. TIMELY AND SUFFICIENT RETRACTION.

(a) A retraction is timely if it is published before or within 30 days after receipt of a request pursuant to Section 13.

(b) A retraction is sufficient if it:

(1) is communicated in writing to the requester, is published in a manner and medium reasonably calculated to reach substantially the same audience as the publication complained of, and, if the retraction is published in another medium to conform to the 30-day period required by subsection (a), is also published in the next practicable issue or edition, if any, of the original publication; and

(2) refers to the challenged statement and:

(i) corrects the challenged statement;

(ii) in the case of a statement implied by a publication, or arising from innuendo, sarcasm, or accompanying conduct, disclaims any intent to communicate or to have communicated the implied meaning or to assert its truth; or

(iii) in the case of a statement attributed to another person, identifies that person and disclaims any intent to assert or to have asserted the truth of the statement.

(c) Notwithstanding subsection (b), a retraction is sufficient if the plaintiff agrees in writing that it is sufficient.

COMMENT TO SECTION 15

Section 15 sets out the requirements for a timely and sufficient retraction. A "timely" retraction must be published within 30 days of a request for retraction. A "sufficient" retraction must be published in substantially the same manner and medium as the original communication unless publication in some other manner and medium is reasonably calculated to reach the same audience as the original communication.

The important factors in determining whether a retraction is sufficient are reasonableness and whether the efforts are directed at reaching the same audience. Where publication is frequent, the retraction question is not likely to be problematic. Given the scope of the [Act], however, the obligation to retract will apply to all forms of communication, some of which will be narrowly focused, infrequent, and even one-time only. In many of these settings the [Act's] focus on reasonable efforts to reach the same audience will be important.

Newspapers and other frequent publications have been the principal subjects of retraction statutes throughout the country. Ordinarily retractions are required to be placed in similar locations to those in which the original story occurred, although even this rule is dependent upon a number of factors, including the nature and scope of the original story as well as the newspaper's practices concerning reserved space for corrections. Such alternatives, as well as others presented in different types of media, such as radio and broadcast, should be addressed in terms of the Act's requirement that the retraction, in its location and prominence, should be reasonably calculated to reach substantially the same audience as the original publication.

With other media and in other contexts, however, the rule will yield different results. For example, retraction of a defamatory employee reference or evaluation may require no more than contacting those persons or firms to whom the defamatory statement was communicated. If the statement has made its way into permanent files or broader audiences, however, reasonable efforts to have the material removed from such files or to communicate the retraction to identifiable members of the broader audience should be attempted.

For a book currently being sold, with no next edition in sight, reasonable efforts to retract might involve several

measures: make necessary corrections in any future editions; notify persons who have purchased the book, if that information is available, or instead attempt through a notice at bookstores or a press release to reach this group; and provide through an insert or other warning notice to those persons who will, in the future, buy the current edition. The latter step assumes, of course, that future reputational harm can be avoided by such an insert rather than by recalling and correcting books that are on the shelf but unsold.

In the case of an oral defamation to friends or colleagues -- a classic slander -- a letter to those persons retracting the defamation (ungrudgingly, of course) might suffice, on the assumption that word of the apologetic retraction would spread as rapidly in the channels of gossip as did the original defamation.

Under subsection (b)(2) a "sufficient" retraction must also correct the original communication. An equivocal retraction will not satisfy this requirement. But where the alleged defamation was the result of an implication contained in a communication or a statement attributed in the publication to another person, a sufficient retraction need only contain a statement that the party making the communication did not intend the implication and disclaims it, or that in publishing the attributed statement of another person the publisher disclaims any intent to attest to the truth of the facts contained therein. This will allow the publisher to disavow the alleged implication and yet stand behind the "facts" of the story.

It is important to note that in the case of statements attributed to another person, the retraction must identify that person even if the original publication did not do so.

SECTION 16. ABSOLUTE PRIVILEGES. An action may not be maintained under this [Act] based on:

(1) a statement made:

(i) in and pertaining to a judicial proceeding by a judge, attorney, witness, juror, or other participant;

(ii) in and pertaining to a legislative proceeding by a legislator, attorney, aide, witness, or other participant; or

(iii) in and pertaining to any quasi-judicial or quasi-legislative executive or administrative proceeding by an executive or administrative official, attorney, witness, or other participant;

(2) a statement that constitutes a fair and accurate report of an official action or proceeding of a governmental body, including an order or opinion of a court, or of a meeting of a governmental body which is open to the public;

(3) a statement published with the consent of the person harmed;

(4) a statement communicated between husband and wife; or

(5) a statement required by law to be published.

COMMENT TO SECTION 16

In listing the absolute privileges applicable to defamation actions, it is intended that Section 16 contain a statement of all such privileges. This is consistent with the desire to make uniform the basic practices applicable to the defamation tort. Two caveats should, however, be noted. First, the privileges are stated in very general terms, and therefore are intended to allow for minor differences in scope and interpretation that exist from state to state. Such differences would exist, for example, in the specific application of the privileges pertaining to judicial, legislative, and quasi-judicial or quasi-legislative proceedings, as well as interpretations of the particular individuals who may be able to claim protection under the privilege. For a sense of some of the variations, see Prosser & Keeton, The Law of Torts, § 115 (5th ed. 1984); Restatement (second) of Torts, §§ 582-592A (A.L.I. 1977). Second, the absolute privileges are not stated in the exclusive, and therefore the section is not designed to foreclose the development of further absolute privileges at common law or as a matter of constitutional requirement. The statement of privileges does, however, constitute a full listing of absolute privileges generally recognized in current law.

Section 16(4) provides an absolute privilege for communications between husband and wife. At common law there has not been, historically speaking, such a privilege, although such statements have not been subject to liability on the ground that there was no publication. The more common view today is that the publication rule in such cases was an artifice, and that the better approach would be to privilege such statements directly. That is the approach taken in the current draft.

The absolute privileges stated in Section 16 are not intended to exclude other absolute privileges that may stem from other sources of law. For example, privileges stemming from the federal speech and debate clause, U.S. Const. Art. 1, § 6, ch. 1, their counterparts at the state level, and other legislative, executive, and judicial privileges are available even though not mentioned in the Act. The source of these privileges is generally to be found in statutory or constitutional provisions not specifically applicable only to defamation claims. See Barr v. Mateo, 360 U.S. 564 (1959).

Claims of absolute privilege, whether listed in Section 16 or based on other law, may be raised in actions for vindication under Section 5.

SECTION 17. CONDITIONAL PRIVILEGES.

(a) A person may not be held liable for damages based on a statement that is:

(1) reasonably necessary to protect the publisher's legitimate interests;

(2) reasonably necessary to protect the legitimate interests of others;

(3) reasonably necessary to protect or foster a common interest between the publisher and the recipient of the communication; or

(4) made to a person officially charged with the duty of acting in the public interest and in relation to that person's official responsibilities.

(b) The privileges under subsection (a) are not available if the plaintiff proves that the publisher:

(1) unreasonably published the statement to persons other than those to whom publication was necessary to serve the interests giving rise to the privilege; or

(2) published the statement with knowledge of its falsity or reckless disregard for its truth.

COMMENT TO SECTION 17

As with the statement of absolute privileges in Section 16, the Act provides a listing in Section 17 of the conditional privileges at common law. The statement of privileges is general so as to comprehend minor differences in interpretation in the various states, and the privileges are not listed as exclusive in order that additional privileges recognized in various states, or which might arise in the future, not be foreclosed. The privileges are drawn generally from the Restatement (Second) of Torts, §§ 594-598A (A.L.I. 1977).

The Act treats publications protected by conditional privilege (i.e. the scope of publication comports with the requirements of a privilege) in the same manner as statements falling within the public figure and public official constitutional privileges. Actual malice applies in both contexts. This reflects a judgment that there is little policy justification for treating common law and constitutional privileges differently, and that much confusion can be avoided by simplifying the standards for various privileges.

The fair comment privilege, formerly recognized in the Restatement and still recognized in most jurisdictions, has not been included, nor is it currently included in the Restatement. See Restatement (Second) of Torts §§ 606-610 (A.L.I. 1977). The reason for not including the fair comment privilege is two-fold. First, given that statements of opinion are not, by virtue of the definition of factual statement in Section 2, actionable the privilege is not necessary. Second, the other privileges in the Act, including specifically the constitutional privileges outlined in Section 18, were deemed to make the fair comment privilege redundant, as those privileges would provide overlapping, and often greater, protection.

It should be noted that the fair report privilege, which applies to accurate and fair reports of official actions or proceedings open to the public, is included in the listing of

absolute privileges in Section 16(2). This privilege is sometimes considered to be a qualified privilege, but the better practice seems to be to consider it an absolute one, subject to its qualifications of "accuracy" and "fairness."

Similarly, the protection of a person who provides a means of publication for a privileged publisher, often described as a "wire service" privilege, is not included in the Act, as the constitutional privileges have made it unnecessary.

SECTION 18. CONDITIONAL PRIVILEGE FOR STATEMENTS CONCERNING PUBLIC OFFICIALS AND PUBLIC FIGURES. A person may not be held liable for damages based on a statement about a public official or a public figure unless the plaintiff proves that the statement was:

(1) unrelated to the person's status as a public official or public figure; or

(2) made with knowledge of its falsity or reckless disregard for its truth.

COMMENT TO SECTION 18

Section 18 reflects the constitutional privileges applicable to statements concerning public officials and public figures. The statements must be related to the person's status as a public official or public figure, and can be overcome only upon a showing of actual malice. Section 18 is intended fairly to reflect current law. The section does not affect future developments except insofar as they might be less protective than current law.

It should be noted that the negligence privilege established for "private" libel plaintiffs in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and its progeny is not reflected in Section 18, but is instead contained in Section 9 as a precondition to recovery of damages. Because negligence was deemed an appropriate precondition to recovery of damages in any type of defamation action, including purely private ones not covered by Gertz, and because negligence is not required to be proven in vindication actions under Section 5, the requirement

was placed in the damage section rather than stated as a privilege.

The Act does not define "public official" and "public figure," but instead relies on the Supreme Court's still-evolving approach to the meaning of those terms. Under the Court's current approach, the category of public officials includes essentially all public employees, and public figures include those persons, whether public employees or not, "who are ... intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), quoted in Gertz v. Robert Welch, Inc., 418 U.S. at 336-337, and Milkovich v. Lorain Journal, 111 L.Ed. 2d 1, 15 (1990). In both cases the constitutional privilege afforded a publisher only applies to "a defamatory falsehood relating to [a public official's] official conduct," or to the public figure's relationship to a public issue. Milkovich v. Lorain Journal, 111 L.Ed. 2d, at 14, quoting New York Times Co. v. Sullivan, 376 U. S. 254, 279-280 (1964).

SECTION 19. LIABILITY OF REPUBLISHER. A person who republishes a statement is subject to liability under this [Act] as if the person were an original publisher.

COMMENT TO SECTION 19

Section 19 states the long-standing rule that persons who republish information are subject to liability as if they were the original publisher. Consideration was given to placing conditions on liability for republication, such as the foreseeability of harm, the reasonableness of reliance on the original publisher, and the like, but it was concluded that the various privileges contained in the Act would, taken together, provide adequate protection for republishers in such circumstances. See generally Restatement (Second) of Torts, §§ 578, 581.

SECTION 20. LIABILITY FOR REPUBLICATION BY ANOTHER. A publisher is subject to liability for harm caused by a reasonably foreseeable republication by another person unless:

(1) the publisher made a sufficient retraction prior to the republication;

(2) the publisher did not publish with knowledge of falsity or reckless disregard for truth, and requested the republisher, before the republication, not to publish; or

(3) the republication was made or caused by the party harmed.

COMMENT TO SECTION 20

Unlike the relatively straight-forward way that liabilities of republishers have been dealt with in Section 19, the Act provides a more specific outline of potential liability of publishers for subsequent republication. Under Section 19 a republisher is in a greater measure of control over its liability, and has a full panoply of privileges available to it as it makes a publication judgment. In contrast, Section 20 imposes liability on a former publisher for subsequent publications over which that publisher may have no control and little, if any, information. Accordingly, Section 20 limits earlier publishers to liability only for reasonably foreseeable republications, and even with respect to such publications provides a safe harbor against liability for the former publisher if a sufficient retraction has been made or if the former publisher requests a republisher not to publish and if the former publisher did not publish with actual malice.

It is assumed with respect to Sections 19 and 20 that local law and existing third-party practice in various jurisdictions will deal with questions of joint and several liability, indemnification as between an original publisher and a republisher, and the ability to join such parties in an action.

SECTION 21. INFORMATION RETRIEVAL SERVICES. A library, archive, or similar information retrieval or transmission service providing directly or through electronic or other means access to information originally published by others is not subject to

liability under Section 19 or 20 if the library, archive, or similar information retrieval or transmission service:

(1) is not reasonably understood to assert in the normal course of its business the truthfulness of the information maintained or transmitted; or

(2) takes reasonable steps to inform users that it does not assert the truthfulness of the information maintained or transmitted.

COMMENT TO SECTION 21

Section 21 is designed to provide protection for the increasing number of library-type information retrieval or data-base sources of information, such as Lexis, Westlaw, Nexis, and the like. Data-bases are increasingly serving as principal sources for historical as well as contemporaneous information, much like the traditional library or archive. The provision of access to information through such library-type services is protected under Section 21 if the person using a service would not reasonably believe that the maintenance or provision of access to the information carries any connotation as to its truthfulness or reliability. In other words, as long as there is reasonable notice in the ordinary course of business that the truthfulness or reliability of the information is not asserted by virtue of its maintenance and accessibility, the information retrieval or transmission entity will bear no liability for subsequent republication. Section 21(2) provides a "safe harbor" by which the maintainer of such information may notify those using it of the fact that the material's truthfulness is not asserted and should not be relied upon. The provision of such notification by, for example, a warning or disclaimer must be reasonable in order to qualify for protection from liability.

It is assumed by the drafters that such traditional facilities as public libraries, for example, would generally be exempt from liability by virtue of Section 21(1), as it is normally understood in the course of business that a public library does not attest to the truthfulness of all of the material and information contained within its collection.

The term "information . . . transmission service" used in the Act is intended to cover not only pure transmission services, but also computer bulletin boards. Such bulletin boards, however, must be of such a nature that the users do not

understand the transmitting service to attest to the truthfulness of the information transmitted, or the service should so inform the customers. In excluding such transmission services from liability, the Act does not preclude liability against the person or persons who originate a defamatory message which is carried on the transmission service.

SECTION 22. SINGLE AND MULTIPLE PUBLICATIONS.

(a) Except as provided in subsections (b) and (c), each publication is a separate publication.

(b) A publication simultaneously received by more than one person is a single publication.

(c) An aggregate and reasonably contemporaneous publication is a single publication.

(d) As to any single-publication damages for all resulting harm to a plaintiff must be recovered in a single action under this [Act].

COMMENT TO SECTION 22

The single publication rule under Section 22(a)-(c) is drawn, although with significant drafting changes, from the Restatement (Second) of Torts § 577A (A.L.I. 1977). See also the Uniform Single Publication Act (1952) which, while different in form from the Act and the Restatement, is similar in substance. The Act treats "aggregate and reasonably contemporaneous" publications as single publications. This differs in approach from the Restatement, which uses the term "aggregate" but also specifies that any "edition of a book or a newspaper, a radio or television broadcast, and an exhibition of a motion picture" is a single publication. Given technological change, these particularized categories are both incomplete and outdated. In their place, the twin ideas of aggregation and contemporaneous publication were used. The Act is not intended to change the rule with respect to motion pictures, books, newspaper, radio, and TV, nor is it intended to change the basic underlying approach reflected in the Restatement as it will in the future be

applied to new technologies, such as rental and home movies, pay TV, and the like.

Subsection (d) departs from the Restatement in that it concerns only the recovery of damages from all jurisdictions in the action, and puts that provision in mandatory, rather than permissive, terms. Section 577A (4)(c) of the Restatement (Second) of Torts also bars recovery of damages between the same parties in all jurisdictions. Such a provision was not included in the Act because of its doubtful enforceability in other jurisdictions and because doctrines of issue preclusion and res judicata would likely address many of the problems.

SECTION 23. SURVIVABILITY OF CLAIMS; DEFAMATION OF DECEASED PERSON.

(a) A claim arising under this [Act] survives the death of the harmed individual, but only to the extent that the claim is for vindication under Section 5 or for the recovery of pecuniary damages. This section does not affect the survivability of other claims arising from the publication.

(b) A person who publishes a statement concerning a deceased person is not liable under this [Act] to the estate of the deceased person or the deceased person's relatives.

COMMENT TO SECTION 23

Section 23 departs from the common law rule of non-survivability of defamation claims, as well as the common practice in state survival statutes to exclude defamation claims from their reach. See Prosser & Keeton, The Law of Torts § 126 (5th ed. 1984). Under the Act defamation claims that arise before the death of a plaintiff survive that person's death. A rule of non-survivability was considered unfair, as it would require the termination of litigation, for example, upon the death of the plaintiff, and would foreclose the recovery of damages for pecuniary harm experienced by the deceased plaintiff, or the vindication of that person's reputation. It is noteworthy in this connection that defamation actions are not uniformly non-survivable, depending instead on the survival statute in particular states, and that in some states survivability is restricted to pecuniary damages (on the ground that recovery of

emotional damage would represent a windfall to the estate) or excludes exemplary or punitive damages. Id. Given the Act's limitation on recoverable damages, the survivability provision was deemed to be a reasonable compromise of the competing interests.

Section 23 does not, however, change the general rule that a deceased person cannot be defamed. The provision dealing with defamation of deceased persons is drawn from the Restatement (Second) of Torts, Section 560 (1977).

SECTION 24. EXCLUSIVE REMEDY; OTHER ACTIONS.

This [Act] provides the exclusive remedy for reputational or dignitary harm to a person caused by the publication of a false statement.

COMMENT TO SECTION 24

Section 24 is intended to foreclose all other claims based on reputational or dignitary harm arising from and based upon the falsity of a published statement. This would foreclose such claims as emotional distress, negligence, and false light privacy, but not claims based, for example, on privacy invasion for which the falsity is irrelevant. The preclusive effect of Section 24 is limited to causes of action that depend on the publication of false fact, and in which the injury is at least in part attributable to the falsity. Thus a claim arising in privacy, for example, which involves published falsity but which does not depend on that falsity for proof of the claim or of injury, would not be precluded. But when such a claim does depend upon falsity, the Act precludes it even if the remedy provided in such a claim is for dignitary (e.g., privacy) harm rather than harm to reputation.

SECTION 25. LIMITATION OF ACTIONS.

(a) A claim under this [Act] is barred unless an action is commenced in a court of competent jurisdiction within

five years after the publication or, in the case of a claim against a publisher based on a subsequent republication by another publisher, within 10 years after the publication from which the republication was derived.

(b) Within the period of limitations established by subsection (a), a claim is barred one year after the plaintiff knew or should have known of the publication or republication.

(c) The limitation periods of this section are suspended during the period provided in Section 15(a) for responding to a request for retraction.

(d) For purposes of this section, the date of publication printed on or contained within a publication is the date of publication, unless later publication is proved.

COMMENT TO SECTION 25

Section 25 contains two provisions addressing limitations on actions. First, it balances the interests of both parties to a suit under the Act by adopting a rule based on plaintiff's discovery of the publication but strictly limiting the period for filing suit once discovery is or should have been made and precluding all suits after five years of the publication. Second, it provides a ten-year limitation for suits based on republication covered by Section 20.

Subsection (b) provides that a plaintiff must commence a suit under the Act within one year of the plaintiff's actual or constructive knowledge of the publication. Although most states provide a one-year statute of limitations on libel actions, state statutes vary as to when the limitations period begins. Some states provide that a libel cause of action accrues when the publication is made, see N.Y. CPLR Law § 215 (McKinney 1974); Ill. Ann. Stat. ch. 110, para. 13-201 (Smith-Hurd 1934), while other states provide that a libel cause of action does not accrue until the plaintiff learns of the publication. Cal. Civ. Proc. Code § 340(3) (West 1982). Basing the statute of limitations on the point of the publication has the advantage of providing a definite limitation on a publisher's liability. The Act departs from this approach in recognition of the fact that a person can be injured by a publication of which he or she is unaware.

A principal reason that a one-year "discovery" statute of limitations is used is that the Act covers private as well as media defamation. With a media defamation, such as one that occurs in a local newspaper, a discovery provision should have no significant effect in most cases, as it should be interpreted as justifying the conclusion that the plaintiff "should have known" of the story at the time of its publication in the newspaper. Purely private defamations, however, are more often unknown to the defamed individual until a later time, such as at the time of a subsequent job evaluation or at the point of an adverse job decision. It is in view of these problems arising in the private setting that a discovery provision was used.

Subsection (a) provides that a publisher's potential liability is terminated after five years of the publication. The five-year limit on liability represents a balance struck between fairness to plaintiffs and fairness to defendants. The Act protects the unaware plaintiff, but only for five years. Accordingly, a publisher will not have to defend a suit more than five years after the publication.

Subsection (a) also limits the original publisher's liability for foreseeable future republications to 10 years.

Subsection (c) provides that the statute of limitations is tolled while the plaintiff awaits a defendant's reply to a request for retraction. Although Sections 12 and 15 require a defendant to respond to a request for a retraction within 30 days, if the request comes within 30 days of the running of the statute of limitations a defendant should not be able to delay his answer to permit the running of the statute.

[Note to revisers]

[All or part of the statue of limitations provision can, if appropriate, be inserted in a statutory chapter of the State Code, which sets forth general statutes of limitations. The state's general chapter on statutes of limitations may include a period of limitations for libel and slander, which will need to be repealed and replaced by Section 25 or portions of it. By placing the provisions of Section 25 in the general statute of limitations provision, the ordinary tolling provisions applicable to general statutes of limitations, such as absence of a defendant, the minority of a plaintiff, and the like, will be made applicable.]

SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 27. SHORT TITLE. This [Act] may be cited as the Uniform Defamation Act.

SECTION 28. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 29. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 30. APPLICATION TO EXISTING RELATIONSHIPS. This [Act] applies to all publications made on or after its effective date.